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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,
Petitioner,

v.

U.S. PHILIPS CORPORATION, NORTH
AMERICAN PHILIPS CORPORATION,
N.V. PHILIPS GLOEILAMPENFABRIEKEN,
and
WINDMERE CORPORATION,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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April 22, 1993

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APPENDIX Q – Supplemental Declaration of William L. Androlia (with two attachments) submitted with Izumi's Motion for Leave to Oppose Vacatur as an Appellee or Alternatively for Leave to Intervene and Oppose as an Intervenor, filed with the United States Court of Appeals for the Federal Circuit, May 28, 1992.	166a
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The following opinions, decisions, judgments, orders and other parts of the record have been omitted in printing this appendix because they appear on the following pages in the appendices to the printed Petition for Certiorari ("Pet.") and the Joint Brief of Respondents in Opposition ("Res."):

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Indemnity Agreement Between Windmere and Izumi, dated February 20, 1984.	Pet. A11
Order of Judgment of the United States District Court for the Southern District of Florida, entered April 6, 1990	Pet. A7
Judgment Regarding Unfair Competition Claims of the United States District Court for the Southern District of Florida, entered May 4, 1990	Pet. A8
Memorandum Opinion of the United States District Court for the Northern District of Illinois, entered October 5, 1990	Pet. A22
Joint Motion to Grant Certiorari, Vacate Judg- ment of Court of Appeals and Remand with Directions to Vacate Judgment of District Court on Grounds of Mootness, <i>City Gas Co. of Fla. v. Consolidated Gas Co. of Fla.</i> , 111 S. Ct. 130 (1991) (No. 90-953), dated February 27, 1991.	Res. C1
Joint Motion to Dismiss the Appeal as Moot and Vacate the Judgments Below in the United States Court of Appeals for the Fed- eral Circuit, dated May 11, 1992	Pet. A31
Declaration of William L. Androlia in the United States Court of Appeals for the Federal Circuit, dated May 15, 1992.	Pet. A13
Order of the United States Court of Appeals for the Federal Circuit, entered July 31, 1992.	Pet. A1

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Motion to Grant, Vacate and Remand on Grounds of Mootness, <i>Continental Casualty Co. v. Fibreboard Corp.</i> , 113 S. Ct. 399 (1992) (No. 91-1993), filed September 30, 1992.	Res. B1
Order of the United States Court of Appeals for the Federal Circuit Denying Izumi's Peti- tion for Rehearing and Suggestion for Rehear- ing In Banc, October 2, 1992.	Pet. A9
Memorandum Opinion of the United States Dis- trict Court for the Northern District of Illinois, entered October 13, 1992.	Pet. A36
Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1291(b) and (c) From Orders Certified by the United States District Court for the Northern District of Illinois, <i>U.S. Philips Corp. v. Sears</i> , dated November 16, 1992.	Res. A1

1a

APPENDIX A – CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

The Florida District Court:

Date	NR	Proceedings
1984		
Oct. 23	1	COMPLAINT for patent infringement & unfair competition.
Nov. 21	5	AMENDED complt.
Dec. 4	9	ANSWER, counterclaims, third party complt, by Windmere Corp.
1985		
Jan. 28	21	REPLY to Windmere's Counterclaim, by U.S. Phillips
	31	27 AMENDED COMPL with Local Rule 14(a)(4), by Pltf.
Feb. 1	28	ANSWER & COUNTERCLAIM of Izumi Kaisha.
	14	33 REPLY to counterclaim of I. Kaisha, by Pltfs.
Mar. 27	64	ANSWER, by N.V. Philips to Third Party Complt. by Windmere.
Jun. 18	103	AMENDED ANSWER, counterclaims & 3rd pty complt. of deflt. Windmere Corp. & demand for jury trial on all issues.
Sept. 27	162	REPLY of plts. to deflt. Windmere's amended counterclaim.
	27	163 ANSWER of N.V. Philips' to amended third party compl. of Windmere Corp.

Date	NR	Proceedings
Dec. 30	272	AMENDED trial and scheduling ORDER (SM 12/26/85) Trial begin 3/31/86, ptys shall file their stip on 1/20/86. P/t conf is set for 3/5/86, Expert witness interrog's shall be due on 1/31/86. See original order for further information. (EOD 1/2/86-ccap).
1986		
Apr. 2	360	MINUTES of civil trial of 4/2/86, Trial cont unitl 4/3/86.
3	361	MINUTES of civil trial of 4/3/86, Trial cont to 4/4/86
4	362	MINUTES of civil trial of 4/1/86, Trial commended, Statement of case to jury, Jury impaneled & sworn, trial cont unitl 4/2/86.
4	365	MINUTES of civil trial of 4/4/86, trial cont to 4/7/86.
7	366	MINUTES of civil trial on 4/7/86, Trial cont to 4/8/86.
8	367	MINUTES of civil trial on 4/8/86, trial cont unitl 4/9/86.
10	373	MINUTES of civil trial on 4/9/86.
10	374	MINUTES of civil trial on 4/10/86.
16	393	MINUTES of civil trial of 4/14/86, trial cont'd to 4/16/86.
16	394	MINUTES of civil trial of 4/15/86, trial cont'd to 4/17/86.

Date	NR	Proceedings
16	395	MINUTES of civil trial of 4/16/86, trial cont'd to 4/17/86.
17	398	MINUTES of civil trial of 4/17/86, trial cont unitl 4/18/86.
18	399	MINUTES of civil trial of 4/18/86, trial cont unitl 4/21/86.
21	403	MINUTES of 4/21/86, trial cont'd unitl 4/22/86.
22	408	SPECIAL verdicts and interrog's.
23	409	MINUTES of civil trial of 4/22/86, jury returned in favor of (see verdict form)
30	415	FINAL (SM 4/30/86) pltfs' recovers for debts' the amount of \$6,500.00. All claims are dismissed w/prej. (EOD 5/2/86-M-ccap).
May 12	422	MOTION for judgment notwithstanding the verdict on the patent issues, by debts'.
12	425	MOTIONS for a new trial, by pltfs'.
12	427	MOTION for judgment notwithstanding the verdict, by North American Philips.
21	430	ORDER (SM 5/20/86) of permanent injunction. Defts are permanently enjoined under 35 U.S.C. Sec. 283 during the term of U.S. JPatent No. 4,277,301. (EOD 5/22/86-ccap).
June 26	460	ORDER (SM 6/27/86) DENYING Windmere's motion to modify order of permanent injunctive relief & motion to stay. (EOD 7/1/86-ccap).
Aug. 11	463	SUPP MOTION for a new trial or in alt for relief of judgment, by pltf N.A. Phillips.

Date	NR	Proceedings
<i>1987</i>		
June 5	516	ORDER (SM 6/4/87) DENYING mot for judgment notwithstanding verdict. (EOD 6/12/87 CCAP)
5	517	ORDER (SM 6/4/87) DENYING mots for new trial. (EOD 6/12/87 CCAP)
8	518	ORDER (SM 6/8/87) GRANTING USP, NAPC & NVP's mots for directed verdict. (EOD 6/12/87 CCAP)
8	519	ORDER (SM 6/8/87) DENYING mot to vacate exparte order & to strike improper filings. (EOD 6/12/87 CCAP)
8	522	ORDER (SM 6/8/87) DENYING NAPC's mot for judgment notwithstanding verdict. (EOD 6/12/87 CCAP)
30	527	NOTICE OF APPEAL from the order entered on 6/8/87 granting Rule 54(b) by def 1 (COPIES to Attys of Rcrd. Crt. Rep. Coord) FEE PAID # 50176 (EOD-7/6/87-CCAP)
<i>1988</i>		
May*20	530	ORDER (SM 5/20/88) Philips' motn for new trial GRANTED. Cause set for S/ Conf on 6/29/88. (EOD 5/23/88-CCAP)
<i>1989</i>		
Dec 20	582	ORDER (SM - 12/18/89) Setting trl for 1/22/90 ptys submit p/t stip by 1/5/90 (EOD-12/26/89-CCAP).

Date	NR	Proceedings
<i>1990</i>		
Jan. 18	592	PRETRIAL stip purs Local Rule 14(D), by pltf.
Feb. 6	603	ORDER (SM-2/5/90) Setting trl for 3/5/90 (EOD-2/8/90-CCAP).
Mar. 19	28	MOTION for directed verdict on unfair competition clm or alternatively for reinstatement of the 1st jury's verdict & memo in supp, by deft Windmere.
Apr. 4	653	REQUEST for judicial notice, by pltf NAPC.
6	656	MINUTES of Day #1 j/t, 3/12/90.
6	657	MINUTES of Day #2 j/t, 3/13/90.
6	658	MINUTES of Day #3, 3/14/90.
6	659	MINUTES of Day #4, 3/15/90.
6	660	MINUTES of Day #5, 3/16/90.
6	661	MINUTES of Day #6, 3/19/90.
6	662	MINUTES of Day #7, 3/20/90.
6	663	MINUTES of Day #8, 3/21/90.
6	664	MINUTES of Day #9, 3/23/90.
6	665	MINUTES of Day #10, 3/24/90.
6	666	MINUTES of Day #11, 3/25/90.
6	667	MINUTES of Day #12, 3/26/90.
6	668	MINUTES of Day #13, 3/27/90.
6	669	MINUTES of Day #14, 3/28/90.
6	670	MINUTES of Day #15, 3/29/90.
6	671	MINUTES of Day #16, 3/30/90.

Date	NR	Proceedings
6	672	MINUTES of Day #17, 4/2/90.
6	673	MINUTES of Day #18, 4/3/90.
6	674	MINUTES of Day #19, 4/4/90.
6	675	MINUTES of Day #20, 4/5/90
6	676	MINUTES of Day #21, 4/6/90
6	677	SPECIAL antitrust interros.
6	678	SPECIAL unfair competition interros.
6	679	ORDER (SM-4/6/90) Upon jury verdict, Judgment in favor of deft Windmere in amt \$89,644,257.00 (EOD-4/9/90-CCAP-M) JS-6 4/6/90
11	680	MOTION for judgment notwithstanding verdict & new trl & stay of exec, by pltfs.
16	684	MOTION for JNOV on unfair competi- tion clm, by pltf NAPC.
16	685	MOTION for new trl on unfair competi- tion clm, by pltf NAPC
May 4	712	JUDGMENT (SM-5/4/90) DISMISSING w/prej pltfs' clms against deft Windmere under Section 43(a) of the Lanham Act (EOD-5/7/90-CCAP).
July 30	751	ORDER (SM-7/26/90) GRANTING M/o/a, o/a on M/judgement NOV sched for 8/16/90 @ 4:00 (EOD-8/1/90- CCAP).

Date	NR	Proceedings
1991		
Sept. 3	773	ORDER (SM-9/3/91 DENYING motion of Cntrdeft for JNOV or a New trial on Windmere's Antitrust Cntrclm, DENY- ING NAPC's motion for JNOV on the unfair Competition Count and DENY- ING NAPC's motion for a New Trial on the Unfair Competition Count (EOD 9/6/91-CCAP)
30	781	<i>JOINT NOTICE OF APPEAL</i> by U.S. Philips Corporation, North American Philips Corporation & N.V. Philips Gloeilampenfabrieken from Order of Judgment upon jury verdict in favor of deft. Windmere in amount of \$89,644,- 257.00 entered 4/9/90; Judgment regarding Unfair Competition Claims dis- missing with prejudice the claims of U.S. Philips Corporation & N.A. Philips Cor- poration against Windmere under Sec- tion 43(a) of the Lanham Act entered 5/7/90; and Order denying motions by NAPC, N.V. Philips & U.S. Philips for Judgment notwithstanding verdict or a new trial on the Antitrust and Lanham Act claims entered 9/6/91. (Copies to USCA & Attys of Record) (FEE PAID).
1992		
Aug. 7	793	ORDER (FCCA 7/31/92) 1. DENIED Izumi's opposition to the parties' joint motion to dismiss & vacate. 2 VACAT- ING the judgment of 4/6/90 & 5/4/90.

3. REMANDING back to District court.
(EOD 8/20/92-CCAP)

Dec. 31 794 ORDER (SM 12/31/92) DISMISSING
w/ prej and without costs all those
claims subject to the 1990 judgments,
including all verdicts and orders regard-
ing such claims (EOD 1/11/93 (CCAP)

The Federal Circuit:

Date	Proceedings and Orders
September 30, 1991	Notice of appeal filed by Plaintiffs in the district court. (jb)
October 11, 1991	Notice of Appeal and certified list, received. (jb)
Dec 20, 1991	BRIEF FOR THE APPELLANT, filed. (MS-12/17/91) (cr)
Feb 17, 1992	<i>CORRECTED</i> BRIEF FOR AP- PELLEE, filed. (MS-2/17/92) (cr)
Mar 5, 1992	JOINT APPENDIX Vols-I-II 12 each filed. (MS-3/5/92) (cr)
Mar 23, 1992	<i>REVISED</i> REPLY BRIEF FOR APPELLANT, filed. (MS-3/23/92) (cr)
May 1, 1992	12 JOINT MOTION TO DISMISS THE APPEAL AS MOOT AND VACATE THE JUDGMENTS BELOW (MS-05/11/92) FILED: 05/11/92. ON CONSENT. REPLY 1(14) FILED: 05/15/92. ACT- ION ON MOTION (21): GRANT-

Date

Proceedings and Orders

ED. BY MERITS PANEL. FILED:
07/31/92. (EOD 07/31/92 BY JB)
92-1020.

- 13 LETTER FROM COUNSEL FOR
DEFENDANT-APPELLEE (IZUMI
SEIMITSU KOGYO KABUSHIKI
KAISHA) INFORMING COURT
OF ITS INTENT TO FILE AN
OPPOSITION TO JOINT MO-
TION TO DISMISS APPEAL,
ETC. (MS-05/11/92) RECEIVED:
05/11/92 (EOD 05/12/92) (PJT)
92-1020
- 15 APPELLANT'S LTR TO COURT
REGARDING (IZUMI ETC) RES-
PONSE TO THEIR MOTION.
(FS-05/13/92) FILED: 05/14/92
(EOD 05/18/92) (LP) 92-1020
- 16 ORDER: (1) IZUMI SHALL FILE
APPROPRIATE MOTION WITH-
IN 10 DAYS, ETC. (2) PARTIES
TO JOINT MOTION SHALL
FILE ANY RESPONSE WITHIN
10 DAYS THEREAFTER (3)
ARGUMENT OF APPEAL
SCHEDULED FOR JUNE 3 IS
REMOVED FROM CALENDAR.
FILED: 05/18/92 (EOD 05/18/
92) (DF) 92-1020
- 17 JOINT REPLY OF PHILIPS AND
WINDMERE PURSUANT TO
COURT ORDER DATED MAY

Date

Proceedings and Orders

- 18, 1992. (SENT TO PANEL)
(MS-05/26/92) FILED: 05/26/92
(EOD 06/17/92) (PJT) 92-1020
- 18 IZUMI'S - MOTION FOR LEAVE
TO OPPOSE VACATUR AS AN
APPELLEE OR ALTERNATIVE-
LY FOR LEAVE TO INTER-
VENE AND OPPOSE AS AN
INTERVENOR. (MS-05/27/92)
FILED: 05/28/92. ACTION ON
MOTION (21): MOTION DEN-
IED. BY MERITS PANEL.
FILED: 07/31/92. (EOD 07/31/
92 BY JB) 92-1020
- 20 APPELLANT'S ANSWER TO AP-
PELLEE'S MOTION REGARD-
ING THE JOINT MOTION TO
DISMISS AND VACATE THE
JUDGMENTS. (SENT TO PANEL)
(MS-06/04/92) RECEIVED: 06/
04/92 (EOD 06/17/92) (PJT)
92-1020
- July 31, 1992 21 ORDER: ACCORDINGLY, IT IS
ORDERED THAT: (1) Izumi's
opposition to the parties' joint
motion to dismiss and vacate is
DENIED. (2) The parties' joint
motion is GRANTED. The judg-
ments of April 6, 1990 and May
4, 1990 are VACATED. We re-
mand with instructions that the
case be DISMISSED WITH PRE-
JUDICE. (3) Thereupon, Appeal

Date

Proceedings and Orders

- No. 92-1020 is DISMISSED. (jb)
971 F.2d 728 (as)
- APPELLEE - COMBINED PETI-
TION FOR REHEARING AND
SUGGESTION FOR REHEAR-
ING IN BANC (MS-08/14/92)
FILED: 08/14/92 PETITION CIR-
CULATED: 08/20/92 PETITION
DISPOSITION: DENIED. SUG-
GESTION CIRCULATED: 09/15/
92 SUGGESTION DISPOSITION:
DECLINED ON 09/30/92. (EOD
09/30/92 BY CS) 92-1020
- October 7, 1992 *MANDATE ISSUED TO THE
DCT/FL.*
- 25 PETITION FOR WRIT OF CER-
TIORARI FILED 12/30/92, SUP-
REME COURT #: 92-1123. U.S.-
L.W.: 61-3500 (EOD 01/27/93
BY JA) 92-1020
- 26 PETITION FOR WRIT OF CER-
TIORARI FILED 12/30/92, SUP-
REME COURT #: 92-1123.
CERT. GRANTED ON 02/22/93.
U.S.L.W.: 61-3580 (EOD 03/02/93
BY JA) 92-1020
-

**APPENDIX B – AMENDED COMPLAINT FOR
PATENT INFRINGEMENT AND UNFAIR COMPETITION,
FILED IN THE SOUTHERN DISTRICT OF
FLORIDA, DATED NOVEMBER 21, 1984**

[Caption Omitted in Printing]

**AMENDED COMPLAINT FOR PATENT
INFRINGEMENT AND UNFAIR COMPETITION**

The Parties:

1. Plaintiffs, U.S. Philips Corporation (“U.S. Philips”) and North American Philips Corporation (“NAPC”), are both corporations incorporated under the laws of the State of Delaware and both have places of business at 100 East 42nd Street, New York New York 10017.

2. Defendant, Windmere Corporation (“Windmere”), is a corporation incorporated under the laws of the State of Florida and has a regular and established place of business in this district at 4920 N.W. 165th Street, Hialeah, Florida 33014. Defendant, Izumi Seimitsu Kogyo Kabushiki Kaisha, a/k/a Izumi Seimitsu Kogyo Co., Ltd. (“Izumi”), is a corporation incorporated under the laws of Japan and has a place of business at 3-1 Motomachi 2-Chome, Matsumoto City, Nagano Prefecture 390, Japan.

Jurisdiction and Venue:

3. The Court has subject matter jurisdiction with respect to plaintiffs’ claims for patent infringement and unfair competition under 35 U.S.C. § 1 et. seq., 15 U.S.C. §§ 1121 and 1125, and 28 U.S.C. § 1338. Venue is proper under 28 U.S.C. §§ 1391 and 1400(b).

4. Izumi sells or consigns the electric shavers more particularly described herein through brokers, jobbers, wholesalers, or distributors (including but not limited to defend-

ant Windmere), within the State of Florida, for retail purchase by consumers in Florida and elsewhere. This conduct constitutes infringement, as will be shown.

5. By selling or consigning said products, Izumi has (a) committed a tort outside the State of Florida which causes injury to plaintiff in the State of Florida, and has likewise (b) committed a tort within the State of Florida, to the extent that the use and sale of said products causes injury to plaintiff by infringing upon plaintiff’s patent rights in and to its own product. The claim asserted herein arises from the aforesaid acts committed both within and without the State of Florida.

6. By its aforesaid acts, Izumi has injured plaintiff within the State in that its infringing products were and continue to be used, sold, and consumed within the State of Florida in the ordinary course of commerce, trade or use. The use, sale, and consumption of these products within the State of Florida infringes upon plaintiff’s rights and constitutes unfair competition, causing injury to plaintiff.

Background:

7. The claims herein arise as a result of Windmere’s recent introduction and sales of two models of men’s three-headed rotary electric shavers, models RR1 and RR2, which are manufactured in Japan by Izumi. These recent shavers employ a patented invention of U.S. Philips. The overall exterior appearance or visual design impression of these shavers is strikingly similar to the basic visual design impression embodied in the family of NAPC’s men’s three-headed electric shavers long sold by NAPC. This similarity of design impression enables Windmere to trade upon NAPC’s deserved reputation with the purchasing public for three-headed rotary shavers of high quality and performance. Windmere is

thereby able to misappropriate to its own benefit NAPC's good will and favorable public acceptance symbolized by the basic design impression embodied in NAPC's family of three-headed rotary shavers.

8. For more than thirty-five years last past, NAPC has sold high quality, high performance men's electric shavers under the NORELCO trademark to the retail trade in the United States. NAPC has extensively advertised and promoted its NORELCO shavers. Those shavers have long been the largest selling electric shavers in this highly competitive business.

9. NAPC commenced selling rotary shavers in the United States in 1948 when it introduced its first one-headed rotary shaver. Beginning in 1951, improved two headed rotary shavers were first sold by NAPC. In 1966, NAPC introduced improved three-headed rotary shavers in the United States market. Since then, NAPC has sold far more three-headed rotary shavers than one-headed and two-headed rotary shavers.

10. Regularly since 1966, NAPC has introduced improved models of its three-headed rotary shavers. Each has had a commercially attractive, overall design. The three-headed rotary shavers of the NAPC design family have shared the same distinctive overall visual impression. The designs embodied in the current NAPC three-headed rotary shaver models are exemplified by United States Design Patent No. D270,487.

11. Since the mid-1960's, Windmere has marketed hand held hair dryers, curling irons, and other personal hair care appliances to the retail trade in the United States under the WINDMERE name and mark. In early 1984, Windmere announced that it was entering the United States electric shaver market under the RONSON

mark, and has recently begun selling three-headed rotary shavers manufactured for it in Japan by Izumi. Windmere obtained rights to the RONSON mark from the company who had owned that mark but who had long since ceased to use it on electric shavers.

Patent Infringement Claim:

12. On October 14, 1980, United State Patent No. 4,277,301 was duly and legally issued to U.S. Philips as the assignee for an invention in a shaving apparatus. Since that date, U.S. Philips has been and still is the owner of Patent No. 4,227,301.

13. In recent years, NAPC's three-headed rotary shavers have employed the improved shaving apparatus described and claimed in United States Patent No. 4,277,301. This patented shaving apparatus represents an important advance in the electric shaver field. The quality of shavers afforded by the use of this patented apparatus has been and continues to be a significant contributing factor to the favorable public acceptance of NAPC rotary shavers.

14. Windmere is infringing Patent No. 4,277,301 by selling three-headed rotary shavers which include shaving apparatus embodying the patented invention. Izumi is actively inducing the infringement of Patent No. 4,277,301 by making the Windmere three-headed rotary shavers knowing that they will be sold in interstate commerce throughout the United States, and knowing that the sale and use of these shavers in the United States infringes Patent No. 4,277,301.

15. Windmere's infringement of Patent No. 4,227,301 is intentional, and is aggravated by the acts of unfair competition hereinafter pleaded, rendering this an exceptional case under 35 U.S.C. §285.

First Claim for Unfair Competition:

16. NAPC realleges and incorporates herein by reference paragraph numbers 1-11 herein.

17. While the specific designs of NAPC's three-headed rotary shaver models have varied, one from another, in particular individual design details, most have shared a unique, basic visual design impression (the "NAPC Design Impression"). These are readily recognizable by the purchasing public as members of a single family of closely related shavers.

18. NAPC three-headed rotary shavers have long enjoyed a reputation for highest quality and performance with the purchasing public. This deserved reputation is an asset and property right of great value to NAPC. By reason, *inter alia*, of the national advertising and promotion of NAPC three-headed rotary shavers, and the great number of such shavers sold over the years, the purchasing public has come to associate this reputation for high quality and performance with the NAPC Design Impression long exclusively embodied in NAPC three-headed shavers.

19. The Windmere three-headed rotary shavers misappropriate the NAPC Design Impression, and consequently trade upon the public's association of the NAPC Design Impression with NAPC's reputation for quality and performance. Such misappropriation has improperly facilitated entry of the Windmere shavers into this highly competitive business. Windmere has intentionally emphasized the misappropriated NAPC Design Impression as a sales tool, and has thereby fostered a false impression of full equivalency between its three-headed rotary shavers and NAPC three-headed rotary shavers. For example, both are shown side by side in Windmere

national television commercials. Further, Windmere has adopted the same black and red color scheme for its shaver wallet packaging as NAPC has long used for its shaver wallet packaging of its three-headed rotary shavers.

20. NAPC has been and will be damaged by Windmere's copying of the NAPC Design Impression. NAPC's valuable reputation for high quality and performance is and will be wholly at risk in the hands of Windmere's quality control and product performance. Upon information and belief, the initial Windmere three-headed rotary shavers are inferior to NAPC's three-headed shavers in both quality and performance.

21. Unless promptly enjoined, NAPC's damages will be irreparable.

Second Claim for Unfair Competition:

22. NAPC realleges and incorporates herein by reference paragraph numbers 1-11 and 17 herein.

23. By reason, *inter alia*, of the national advertising and promotion of NAPC three-headed rotary shavers, and the great number of such shavers sold over the years, the purchasing public has come to identify NAPC's three-headed rotary shavers by the NAPC Design Impression and to use the NAPC Design Impression to distinguish NAPC's three-headed rotary shavers from other three-headed rotary shavers. Consequently, the NAPC Design Impression, which is non-functional, has developed a trademark significance and is a valuable property right of NAPC.

24. Windmere's embodiment of the NAPC Design Impression in its three-headed rotary shavers unfairly

trades upon the good will and favorable public acceptance and recognition of the NAPC Design Impression. As a result of the advertising and sale of such Windmere rotary shavers, there is a likelihood that the purchasing public will be confused, deceived or will mistakenly believe that NAPC made the Windmere shavers for private label sales, that NAPC sponsors or approves of the Windmere shavers, and/or that NAPC is in some way associated with the making of the Windmere shavers. Windmere has promoted this likelihood of confusion by emphasizing the design impression similarity, and has fostered a supposed association between the shavers. For example, both are shown side by side in Windmere national television commercials. Further, Windmere has adopted the same red and black color scheme for its shaver wallet packaging as NAPC has long used for its shaver wallet packaging of its three-headed rotary shavers.

25. NAPC's rights in its NAPC Design Impression trademark have been and will continue to be damaged by sales of Windmere rotary shavers which, upon information and belief, are of quality inferior to that of NAPC three-headed rotary shavers and do not perform as well as NAPC three-headed rotary shavers.

26. Unless promptly enjoined., NAPC's damages will be irreparable.

WHEREFORE, plaintiffs request an Order of this Court:

A. Permanently enjoining Windmere, its officers, directors, employees, agents and all those under their direction and control, from selling and advertising to sell three-headed rotary shavers:

(1) having a shaving apparatus that is an infringement of Patent No. 4,277,301; and

(2) having a visual design impression, like those of Windmere's current RR1 and RR2 models, confusingly similar to the NAPC Design Impression embodied in NAPC's family of three-headed rotary shavers; and

(3) by displaying Windmere three-headed rotary shavers in wallet packaging having the red and black color scheme long used by NAPC for its shaver wallet packaging of its three-headed rotary shavers; and

B. Permanently enjoining Izumi, its officers, directors, employees, agents and all those under their direction and control, from selling three-headed rotary shavers, embodying the patented invention of Patent No. 4,277,301, to any person who is known to Izumi to plan to ship these shavers to the United States for resale in the United States and from any other act that induces others to infringe Patent No. 4,277,301; and

C. Awarding NAPC its damages including Windmere's profits resulting from the sale of Windmere three-headed rotary shavers, including the RR1 and RR 2 models, having a visual design impression confusingly similar to the NAPC Design Impression; and

D. Awarding U.S. Philips its damages arising from Windmere's and Izumi's infringement of Patent No. 4,277,301; and

E. Awarding U.S. Philips increased damages and its reasonable attorneys' fees and costs herein pursuant to 35 U.S.C. §§284 and 285; and

F. Awarding NAPC its reasonable attorneys' fees and costs herein pursuant to 15 U.S.C. §1117; and

G. Ordering the destruction of all Windmere three-headed rotary shavers, including the RR1 and RR2 models, having a visual design impression confusingly similar

lar to the NAPC Design Impression, and all packaging and advertising materials showing such rotary shavers; and

H. Such other and further relief as the Court may deem just and proper.

DATED this 21 day of November, 1984.

Respectfully submitted,

ALLEGRETI, NEWITT, WITCOFF &
McANDREWS, LTD.

125 South Wacker Drive
Chicago, Illinois 60606

and

FOWLER, WHITE, BURNETT, HURLEY,
BANICK & STRICKROOT

501 City National Bank Building
25 West Flagler Street
Miami, Florida 33130

Telephone: (305) 358-6550

By: /s/ John R. Kelso
John R. Kelso

**APPENDIX C – FINAL JUDGMENT IN THE
SOUTHERN DISTRICT OF FLORIDA,
ENTERED APRIL 30, 1986**

[Caption Omitted in Printing]

FINAL JUDGMENT

THIS ACTION came on for trial before the Court and a jury, Honorable Stanley Marcus, District Judge, presiding, and a jury verdict having been returned on plaintiffs' claims; the Court having directed a verdict dismissing with prejudice certain of defendants' counterclaims pursuant to Fed.R.Civ.P. 50; and dismissing with prejudice the remaining portions of defendants' counterclaims pursuant to Fed.R.Civ.P. 56,

IT IS ORDERED AND ADJUDGED on the verdict of the jury, that Patent No. 4,277,301 is not invalid, that defendants have infringed such patent, that such infringement has not been willful, and that damages are assessed against defendants in the amount of \$6,500 because of such infringement;

THAT on the verdict of the jury final judgment is entered against plaintiffs on the two unfair competition claims contained in the Amended Complaint, and therefore these claims are dismissed with prejudice.

THAT pursuant to Fed.R.Civ.P. 50 U.S. Philips, North American Philips and N.V. Philips Gloeilampenfabrieken ("N.V. Philips") Motion for a Directed Verdict is granted as to Count I, Count II, Count III and Count V of Windmere's Counterclaims, and, with respect to U.S. Philips Corporation and North American Philips Corporation, the Motion for a Directed Verdict is granted as to Count VII, and therefore these claims are dismissed with prejudice; and

THAT pursuant to Fed.R.Civ.P. 56 U.S. Philips Corporation, North American Philips Corporation and N.V. Philips' Motion for Summary Judgment is granted as to Count VI of Windmere's counterclaim and therefore these claims are dismissed with prejudice; and

THAT pursuant to Fed.R.Civ.P. 56 N.V. Philips' Motion for Summary Judgment on Count VII of Windmere's Counterclaim is granted and therefore this claim is dismissed with prejudice.

DONE AND ORDERED at Miami, Florida this 30th day of April, 1986.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Counsel of record

**APPENDIX D – ORDER OF PERMANENT
INJUNCTION OF THE SOUTHERN DISTRICT
OF FLORIDA, ENTERED MAY 20, 1986**

[Caption Omitted in Printing]

ORDER OF PERMANENT INJUNCTION

This action having been tried to the Court and jury, the jury having reached its verdict and findings by answering special interrogatories, concluding that defendants, Windmere Corporation ("Windmere") and Izumi Seimitsu Kogyo Kabushika Kaisha ("Izumi") had failed to prove that U.S. Patent No. 4,277,301 is invalid or unenforceable, and that plaintiff U.S. Philips Corporation had borne its burden of proving the infringement of U.S. Patent No. 4,277,301 by both Windmere and Izumi,

IT IS HEREBY ORDERED AND DECREED:

1. Windmere and Izumi, their respective officers, agents, servants, employees, and attorneys, and all those persons in active concert or participation with them who shall receive actual notice of this injunction by personal service or otherwise, are permanently enjoined under 35 U.S.C. Sec. 283 during the term of U.S. Patent No. 4,277,301, from:

a. manufacturing, using, selling, or offering for sale or use, or causing to be manufactured, used, sold, or offered for sale or use, any Ronson RR-1 or RR-2 rotary shavers that were shipped by Izumi on or before February 10, 1985, such being the date it was represented in the pre-trial stipulation of this cause that Izumi shipped the last shavers having uneven spacing between groups of cutter blades, and that infringe the aforementioned patent;

b. manufacturing, using, selling, or offering for sale or use, or causing to be manufactured, used, sold, or offered

for sale or use, any product that infringes of any claims 1 or 2 of U.S. Patent No. 4,277,301;

c. otherwise directly infringing or contributing to the infringement of or inducing infringement of any of claims 1 or 2 of U.S. Patent No. 4,277,301.

DONE AND ORDERED at Miami, Florida this 20th day of May, 1986.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Counsel of record

**APPENDIX E – ORDER OF THE SOUTHERN
DISTRICT OF FLORIDA GRANTING A NEW TRIAL,
ENTERED MAY 20, 1988**

[Caption Omitted in Printing]

ORDER

THIS CAUSE has come before the Court upon the motion of Plaintiffs U.S. Philips Corporation and North American Philips Corporation (collectively "Philips") for a new trial. As the basis for their motion for a new trial, Philips points to the Defendant Izumi Seimitsu Kogyo Kabushika Kaisha's ("Izumi") failure to fully respond to a document production request, in which Philips requested Izumi to

Produce all documents evidencing, relating to, referring to, or embodying any patent applications and/or patents directed to Izumi rotary shavers and/or component part(s) thereof or contained therein.

Plaintiffs' Set of Requests to Izumi for Production of Documents and Things at ¶ 65. Izumi responded that it would "produce those documents relating to any U.S. patent applications . . . directed to Izumi's rotary shavers and/or components thereof." Izumi's Response to Plaintiff' Set of Requests to Izumi for Production of Documents and Things at 13. Izumi failed to produce any documents relating to its June 14, 1984 patent application for the Izumi-produced Ronson RR1 and RR2 rotary electric razors, which were the subject of this case. We have reviewed the lengthy pleadings filed and taken oral argument as to the issue and for the reasons set forth at some length, we grant Philips' motion for a new trial.

I. Background

Plaintiff Philips has been engaged in the manufacture and sale of rotary electric razors under the brand name "Norelco" since 1963. Defendant Windmere Corporation has sold various goods throughout the United States, including "Ronson" electric rotary razors since 1984. Izumi is the Japanese corporation that manufactures and distributes the Ronson razors.

Philips commenced this action in October 1984, alleging that Windmere and Izumi had engaged in patent infringement and unfair competition by manufacturing and making certain Ronson rotary razors. According to the Complaint, the Defendants' Ronson rotary razors violated Philips' patents on Norelco rotary razors, and created confusion among consumers because the Ronson razors appear nearly identical to the Norelco razors.

Izumi filed a counterclaim against Philips, with respect to Philips' patent number 4,227,301, the patent at issue in the original complaint. In its counterclaim, Izumi averred that Philips violated section 2 of the Sherman Act, 15 U.S.C. §2, by attempting to monopolize and monopolizing the electric shaver and rotary shaver markets in the United States. The counterclaim also alleged that the Plaintiffs conspired to restrain trade in the relevant markets.

The parties engaged in extensive discovery prior to the trial of this case. In the course of discovery, on February 12, 1985, Philips submitted a set of requests for documents and things, which included as Document Request No. 65 the following request:

Produce all documents evidencing, relating to, referring to, or embodying any patent applications and/or patents directed to Izumi rotary shavers

and/or components part(s) thereof or contained therein.

Izumi responded in the following manner:

This request is objected to as being overly broad and as seeking documents that are neither relevant to the subject matter of the present litigation nor calculated to lead to the discovery of admissible evidence. Izumi, however, will produce those documents relating to any U.S. patent applications and/or U.S. patents directed to Izumi's rotary shavers and/or components thereof.

However, when Izumi produced documents relating to its applications for U.S. patents, it failed to produce its June 14, 1984 patent application, covering the Ronson RR1 and RR2 razors manufactured by Izumi which were the subject of the case.

The case was tried April 1-26, 1986 before a jury. At trial, among other things, Izumi maintained that any similarities between its razors and the Philips razors were a result of function, not design, and therefore there was no patent infringement. The jury found Philips' patent number 4,227,301 was valid and that Izumi had infringed on the patent, but also found that the infringement was not willful. Accordingly, the jury awarded Philips \$6,500.00 for patent infringement. Plaintiff Philips subsequently filed this motion for a new trial, after it discovered that Izumi had received a design patent for its Ronson razors. Izumi had applied for the design patent for the Ronson RR1 and RR2 on June 14, 1984 long before the close of discovery in this case. On September 20, 1985, the U.S. Patent and Trademark Office sent Izumi's patent attorney a notice of allowance of the patent. The patent was issued on June 10, 1986. Early in August 1986, counsel for N.A. Philips first learned of the issuance of

the design patent to Izumi for the "ornamental design" of the Ronson razors at issue in this lawsuit. In this motion, Philips claims that Izumi should have produced the documents in its possession relating to its application for a patent, and that because Izumi never produced those documents, a new trial must be granted.

II. Motion for New Trial

There is a well-founded and general principal in favor of finality of judgments. "In the interest that each controversy eventually comes to an end and the courts and the parties be left to proceed to other matters, it is necessary that questions that have been fully considered and decided not be subject to open-ended reconsideration." 6A J. Moore, J. Lucas, & G. Grotheer, *Moore's Federal Practice* ¶60.02 (2d ed. 1987). Federal Rule of Civil Procedure 60(b) is an exception to the policy favoring finality of judgments, and was intended to permit courts to address instances of unjust judgments. *See generally* Note, *Federal Rule 60(b): Relief From Civil Judgments*, 61 Yale L.J. 76 (1952). In reviewing a motion for Rule 60(b) relief from judgment, a balance between "the desirability of finality and the prevention of injustice" must be achieved. *In re Casco Chemical Co. (Abramson v. Superintendence Co.)*, 335 F.2d 645, 651 (5th Cir. 1964).

Indisputably, the party seeking to set aside the judgment bears the burden of proving that setting aside the judgment and granting a new trial is merited. *See Cliett v. Hammonds*, 286 F.2d 471 (5th Cir.), *cert. denied*, 366 U.S. 960 (1961); *see also Booker v. Dugger*, 825 F.2d 281, 283-84 (11th Cir. 1987). Philips seeks relief under Rules 60(b)(2) and 60(b)(3). Rule 60(b)(3) provides:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . .

Fed.R.Civ.P. 60(b)(3). For the movant to prevail on a Rule 60(b)(3) motion, he must prove two elements: first, that the adverse party obtained the judgment through misconduct, and second, that the misconduct prevented the movant from "fully and fairly presenting his case." *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987) (*quoting Harre v. A.H. Robins Co.*, 750 F.2d 1501, 1503 (11th Cir. 1985) (*quoting Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d Cir. 1983))); *see also Square Construction Co. v. Washington Metropolitan Area Transit Authority*, 657 F.2d 68, 71 (4th Cir. 1981). For Rule 60(b)(3) purposes it is not necessary that the information withheld be of such nature as to alter the outcome of the case. *See Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978); *Seaboldt v. Pennsylvania Railroad Co.*, 290 F.2d 296, 299-300 (3d Cir. 1961).

A. Misconduct

Philips cites what it calls three instances of misconduct by Izumi. First, Philips maintains that Izumi failed to fully respond to the document request submitted during the discovery process. Second, it is averred that the president of Izumi and Izumi's attorneys should have produced the patent application in accordance with Federal Rule of Civil Procedure 26(e)(2). Third, Philips contends that Izumi did not comply with this Court's November 12, 1985 discovery order.¹

The Request to Produce that Philips submitted to Izumi on February 12, 1985 asked Izumi to "produce all documents" relating to patent applications. Izumi had filed for a design patent for its rotary razors on June 14, 1984. However, Izumi did not produce any documents relating to, or even mention the existence of its June 14, 1984 application. The June 14, 1984 application was pending with the United States Patent and Trademark Office throughout the pendency of this case, but not once did Izumi produce any document, make any mention, or in any way inform Philips or the Court that it had submitted an application for a design patent for the Ronson RR1 and RR2 rotary razors. At least in that respect, Izumi engaged in Rule 60(b)(3) misconduct. See *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d Cir. 1983).

Izumi claims that its President, Matsumoto Shunji Izumi, was not aware of the patent application until the start of the trial and that its attorneys were not made aware of the application until sometime during the middle of the trial. According to Izumi, because their knowledge of the patent application came over a year and a half after they received the original request for production, they had no duty to disclose the application. We are unpersuaded by this argument for a number of reasons.

First, when an applicant files for a design patent, he is subject to the same conditions as an applicant for an invention patent. 35 U.S.C. §171. Specifically, every patent applicant must attest to an oath that he is the original designer or inventor of the subject matter of the patent application. 35 U.S.C. §115. In addition, the oath must state that the applicant

[h]as reviewed and understands the contents of the specification, including the claims, as amended

by any amendment specifically referred to in the oath or declaration . . .

37 C.F.R. §1.63(h)(1) (1987).

On April 11, 1984, Shunji Izumi signed his June 14, 1984 design application, which provided:

I hereby state that I have reviewed and understand the contents of the above identified specification, including the claim, as amended by any amendment referred to above.

The specification that accompanied the patent application was also signed by Shunji Izumi. Moreover, on June 11, 1985, Shunji Izumi signed a "Verified Statement (Declaration) Claiming Small Entity Status" with respect to the June 14, 1984 application. The "Verified Statement" provided:

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application, any patent issuing thereon, or any patent to which this verified statement is directed.

Thus, at least from April 11, 1984 through June 14, 1985 Shunji Izumi, President of Izumi, was aware of the patent application and was signing documents with respect to the application. It is clear that Shunji Izumi was or should have been aware of the patent application — he signed an oath so stating — and that Shunji Izumi as President of Izumi was an agent of Izumi. A patent owner or applicant is responsible for the acts of its patent agents

who act within the scope of their authority. *See Halliburton Co. v. The Dow Chemical Co.*, 514 F.2d 377, 381 (10th Cir. 1975). Thus, Izumi, as a business entity, had an obligation to produce those documents requested during discovery, but failed to do so.²

Even if we were convinced that Izumi and its attorneys were not made aware of the patent application until some time during trial, at that point in time they had a duty to reveal that information to Philips. Under Fed.R.Civ.P. 26(e), Izumi was under the "duty seasonably to amend" when it discovered that its prior response to the request for production was "incorrect when made." Such a duty does not depend upon the circumstances, but always will arise when the party obtains the information.

A party who acquires actual knowledge that his earlier response was incorrect when he made it must *always* amend his response.

8 C. Wright & A. Miller, *Federal Practice and Procedure* §2049 at 324 (1970) (emphasis added).

According to Izumi, Shunji Izumi did not learn of the patent application until sometime during the trial at the latest and Izumi's attorneys learned about the application during the middle of the trial. *See* Defendants' Opposition to Plaintiffs' Supplemental Motion for a New Trial or in the Alternative for Relief from Judgment at 3; Affidavit of Gary M. Hoffman at ¶5 (Aug. 22, 1986). Once Shunji Izumi and Izumi's attorneys learned of the application, they bore the responsibility under Rule 26(e)(2) to supplement their original responses to the request to production. *See Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1342 n.10 (5th Cir. 1978).

Nor are we convinced by Izumi's counsel's argument that it simply forgot about the document request. *See*

Defendants' Opposition at 15 n.11. Not only did Izumi's attorneys contemplate introducing evidence of the application, but they at least were aware that such evidence could be important to a full and thorough trying of the patent infringement issue. After all, the patent application covered the Ronson RR1 and RR2 razors, which were at issue in Philips' patent claim. Even if Izumi's patent attorneys did not remember the specific document production request, it is inconceivable that they did not realize that such an important piece of evidence may have been subject to discovery. It is not easy to accept the assertion that counsel found irrelevant a patent application and patent for a product that was the subject of Philips' claims based upon the similarities between the products. In fact, Izumi's counsel admits that had it "learned before trial that the Izumi design patent had been allowed, it would have willingly and eagerly disclosed this information . . ." Defendants' Response to North American Philips' Extraordinary Motion for Discovery and Supplemental Response to North American Philips' Motion for New Trial at 4. Instead, Izumi's attorneys, knowing that the patent had been applied for and granted, intentionally withheld that information from Philips.³ Because the information did not reach the counsel for Izumi until during the trial, counsel made the unilateral decision not to disclose any of the information about the patent application or its allowance. Rule 26(e) contains no such time limitation. The duty to disclose the new information arises whenever the information comes to light. Failure to disclose such information is an independent basis for granting a new trial. *See Newsum v. Pennsylvania Railroad Co.*, 97 F. Supp. 500 (S.D.N.Y. 1951); *see also Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir. 1977).

As it is clear that Izumi engaged in misconduct by failing to fully comply with the document request and not supplementing its earlier answer in conformity with Rule 23(e), it is unnecessary to address the third act of misconduct argued by Philips — failure to comply with a discovery order.

B. Prevented from Fully and Fairly Presenting Claim

The second prong of Rule 60(b)(3) is that the failure to receive the evidence must have prevented the party from fully and fairly presenting its claim. In his June 14, 1984 design patent application, Shunji Izumi avowed that the patent was for a design made for ornamental reasons. However, at trial Izumi's position was that the configuration of its rotary shavers was dictated by functional considerations, not ornamental motivations of design.

The distinction between a design patent and an invention patent is both real and important. "A design patent is for appearance and not for a method of manufacture or assemblage, function or utility." 5 E. Lipscomb, *Lipscomb's Walker on Patents* §16:7 at 33 (3d ed. 1986). A design may be defined as

the visual characteristics or aspects displayed by the object. It is the appearance presented by the object which creates an impression, through the eye upon the mind of the observer.

As a design is manifested in appearance, the subject matter of a design application may relate to the configuration or shape of an object, to the surface ornamentation thereof, or both.

A design is separable from the object and cannot exist alone merely as a scheme of surface ornamentation. It must be a definite, preconceived thing,

capable of reproduction and not merely the chance result of a method.

Manual of Patent Examining Procedure §1502 (5th ed. 1983) (quoted in *Lipscomb* at 203). A design patent may be issued for an ornamental, aesthetic idea that does not serve a functional purpose. See generally *In re Morton-Norwich Products, Inc.*, 671 F.2d 1332, 1337-40 (C.C.P.A. 1982); cf. *In re Honeywell, Inc.*, 497 F.2d 1344, 1348 (C.C.P.A.), cert. denied sub nom., *Dann v. Honeywell, Inc.*, 419 U.S. 1080 (1974). Thus, a design patent will not be issued if the design is primarily or solely the result of functional considerations. See *Bergstrom v. Sears, Roebuck & Co.*, 496 F. Supp. 476, 489 (D. Minn. 1980). A design patent is appropriate for "any new, original and ornamental design. . ." *Kwik-Site Corp. v. Clear View Manufacturing Co.*, 758 F.2d 167, 171 (6th Cir. 1985) (quoting 35 U.S.C. §171).

Throughout this litigation, as well as at trial, Izumi maintained that the design of the Ronson RR1 and RR2 was dictated by functional considerations. See, e.g., *Memorandum in Support of Sears Shavers* at 2-6 (filed April 11, 1986). Izumi maintained throughout the case that the "Norelco look" was a result of function, not design, and that Philips could not have an exclusive proprietary right to that look. The claim that the Ronson RR1 and RR2 looked like Norelco razors because of functional considerations was a significant factor at the trial. Izumi took a strong position that its razors' design were dictated by functional necessity, not ornamental reasons.⁴ However, in the application for a design patent, Mr. Izumi stated that the design was a factor of ornamentation, not function. Izumi's failure to produce an important document that related to so significant an issue

in the trial deprived Philips of a full and fair trial of the merits of the case.

There can be no doubt that the patent application would have been relevant evidence. Izumi admitted as much at the oral argument on Philips' motion for a new trial. *See* Transcript at 21, 24 (June 17, 1987). Contrary to Izumi's claim in its memoranda, the evidence would not have been merely cumulative. The former Fifth Circuit aptly put it in *Rozier*:

We cannot know what use, if any, plaintiff's counsel would have made of the [document] had it been produced by [the defendant] prior to trial. However, consideration of one likely use reveals the prejudice that [the plaintiff] may have suffered as a consequence of [the defendant's] misconduct.

....

It is apparent, then, that the [document], far from being a cumulative tidbit of evidence already subsumed in the case presented to the jury, might have been the catalyst for an entirely different approach to the case on a theory that the plaintiff, lacking the document, let die before it reached the jury. Under these circumstances, we hold that [the defendant's] wrongful withholding of information prevented [the plaintiff] from fully and fairly presenting her case.

573 F.2d at 1343, 1345.

We conclude that not having information about the design patent application altered Philips' theory or approach to the case. There are a number of things that Philips could have done differently, had the patent application been made known to it. For example, Philips could have focused its case more on whether the design used by Izumi was dictated by functional considerations

instead of aesthetic reasons. Alternatively, if Philips had knowledge of the patent application, Izumi may have defended differently against the claim, changing the way Philips responded to the defense. Another way the information could have changed the case is to have made a disposition more likely. If Izumi is correct that the allowance of the design patent application would have assisted Izumi more than Philips, *but cf. In re R.M. Smith, Inc.*, 734 F.2d 1483, 1485 (Fed. Cir. 1984) (Patent and Trademark Office determination may be *prima facie* evidence), it is possible that the parties would have been more likely to reach a settlement agreement. Lastly, we note that given the significance of the evidence and the importance of this issue at trial, practically any conceivable effect of the knowledge of the existence of the application would have been significant. Because of the requirement that the Patent and Trademark Office keep all applications in confidence until the patent is granted, Philips could not have discovered the existence of the pending patent application by another method. *See* 35 U.S.C. § 122.

The design/function distinction also was implicated by Jury Instructions. In Jury Instruction 45, the jury was told:

The likelihood of confusion, however, must be caused by the similarity between the primarily non-functional aspects of the designs. In other words, if you find that a likelihood of confusion arises solely from the functional aspects of the products, then you must return a verdict for Windmere.

Furthermore, in Jury Instruction 48, we informed the jury:

Let me now turn to the meaning of functionality. The first question to be determined is to what extent the features of the trade dress are primarily

functional or primarily non-functional. A feature of trade dress is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.

North American Philips contends that the trade dress is primarily non-functional. To make this determination you must find the overall design is primarily non-functional.

If, after reviewing all the evidence, you find that features of the trade dress are functional, then the public is free to copy those features with impunity, and no liability could be imposed on Windmere for copying what you find to be functional. If you find, on the other hand, that the trade dress is primarily non-functional, and you find that Windmere copied the trade dress, then Windmere would be liable for unfair competition.

The fact that rotary shavers can be produced in other forms and shapes may be evidence that the design is primarily non-functional; however, it does not necessarily mean that the design is non-functional. A design or feature may be considered primarily functional if it is the best or one of the few superior designs for the use of the product.

Given the importance of the design/function distinction, and Izumi's failure to produce what was surely relevant evidence, it is apparent that had the truth been revealed, the case may have proceeded differently and a different result may have been forthcoming. These are sufficient grounds to grant Rule 60(b)(3) relief. See *Bros Inc. v. W.E. Grace Manufacturing Co.*, 351 F.2d 208, 211 (5th Cir. 1965), *cert. denied sub nom.*, *W.E. Grace Manufacturing Co. v. Bros, Inc.*, 383 U.S. 936 (1966).

Even if Philips would have used the patent application merely as evidence with which to impeach Mr. Izumi's

testimony that the design of the Ronson RR1 and RR2 was dictated by function, in this particular case that would be sufficient basis to grant a new trial. See *Harre v. A.H. Robins Co.*, 750 F.2d 1501 (11th Cir. 1985). In *Harre*, the defendant relied on a witness who testified as to the causation issue in a products liability case. The defendant's witness represented that he had directed studies on the product in question. The defendant had produced no discovery with respect to the claimed studies. At a later, related trial, the witness testified that he had neither conducted nor witnessed any study done on the product, but was familiar with a study conducted by another individual. The Eleventh Circuit in *Harre*, reversed the district court's denial of a new trial on Rule 60(b)(3) grounds. According to the *Harre* court, the failure of the defendant to produce discovery information about the studies effectively denied the plaintiff the opportunity to cross-examine the witness on important testimony. *Id.* at 1505. The case at bar is similar, in that Shunji Izumi testified that the design of the Ronson razors was necessitated by functional concerns, in contradiction of his oath in the patent application. While it is true that Izumi would not have been estopped from testifying about the functional reasons for the Ronson design, the patent application could have been strong evidence about the nature of the Ronson design and could have served as an important basis with which to cross examine Shunji Izumi. See *Campbell v. Skinner*, 236 F. 359, 360 (S.D. Fla. 1916). The Plaintiff in this case was surely entitled to vigorously cross-examine and confront witness Izumi. Defendants' unilateral decision to withhold what was indisputably relevant and material information impeded that basic right.

III. Conclusion

The discovery process is a basic structural premise on which our system of civil litigation is built. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). It is assumed that the parties to a lawsuit will comply with discovery requests unless they have a valid basis to seek a protective order. To this end, the discovery process requires candor in responding to a discovery request. See *Dollar v. Long Manufacturing Co.*, 561 F.2d 613, 616 (5th Cir. 1977). When a party from whom discovery is sought fails to fully respond to a discovery request, the party seeking discovery may seek to compel discovery. However, when the party seeking discovery is not aware that the other party has not fully complied with the discovery request, the discoverer is in the dark. Instead of being able to compel further discovery to have his discovery request fully satisfied, the discoverer who obtains only partial discovery is left thinking he has obtained full discovery and will try or settle the case based upon what he may believe is full information. Not only is this unfair, it may lead to unjust results. See *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1345-46 (5th Cir. 1978). Willful acts in disregard of the rules governing discovery often require drastic measures by the court. See, e.g., *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 110 (S.D. Fla. 1987) (default judgment entered as sanction for destruction of documents). According, it is hereby

ORDERED AND ADJUDGED that Philips' motion for a new trial is GRANTED. It is further

ORDERED AND ADJUDGED that this cause is set for a status conference before the undersigned at the United States District Court, 300 Northeast First Avenue, Second Floor, East Courtroom, on June 29, 1988, at 5:00 p.m.

DONE AND ORDERED in Miami, Florida this 20th day of May, 1988.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Counsel of record

- FOOTNOTES -

¹ Izumi maintains that it had reached an agreement with Philips whereby there would be no discovery relating to Philips' unfair competition claim. For several reasons, we are not persuaded that such an agreement was fully contemplated by the parties. First, the only evidence of the agreement that Izumi can point to is a June 5, 1985 letter written by its attorney. While that letter may reflect the understanding of Izumi's counsel, there is no indication that Philips contemplated such an agreement. Furthermore, that letter post-dated the February 12, 1985 request for production by four months. Even if an agreement had been reached, Izumi was obligated to fulfill its discovery obligation before the agreement was reached. Second, Izumi engaged in discovery relating to Philips' unfair competition claim after June 5, 1985. In fact, this Court's Order of November 12, 1985 compelled discovery relating to the unfair competition claim. Even if the June 5, 1985 letter reflected some type of agreement relating to discovery, the agreement ceased to have effect by November 12, 1985. Finally, Izumi contends that the reason it did not produce documents relating to its patent applications was that it was unaware of the existence of such documents, not because of a discovery agreement.

² Izumi claims that Shunji Izumi did not understand the complexities of American patent law and thus did not grasp the importance of the June 14, 1984 design patent application. This

argument, of course, assumes Shunji Izumi was cognizant of the patent application. Shunji Izumi did not need to understand American patent law to realize that the patent application was subject to the discovery request. In fact, Izumi's response that it would produce documents relating to patent applications belies this professed ignorance.

³ At the oral argument held before this Court on this motion for a new trial, Izumi's trial counsel conceded that he was made aware of the patent application and the granting of the patent during trial, but failed to produce those documents.

THE COURT: It was obvious, at least at that point, you had zeroed in specifically — this was in or about late March of '85 — on the issue, conceded that it was relevant by virtue of the response you gave. You didn't learn — did you not inquire back then as to whether or not there were any such documents relating to a U.S. patent?

MR. HOFFMAN: Yes, I did, Your Honor. I first inquired in November of 1984; subsequently required [sic], I believe it was May of 1985, was told that it wasn't.

Your honor, the first time I found out was during trial as indicated in my affidavits. The simple fact is I never recall, ever thought about, the issue never came up, the thought never came up, is this — was this ever requested by the other side —

THE COURT: You thought about it to the extent of trying to decide whether to put it in your case in chief, to help you on a point.

MR. HOFFMAN: And we simply decided —

THE COURT: So you zeroed in on the issue, but you never thought about the other side of the coin as to whether or not to help the other side?

MR. HOFFMAN: No, we did not, Your Honor. It just never happened, never came up. The only thought that I had — because it was a theory that I wanted to try, that I wanted to include, could we get it in — I immediately decided there was no way a document — we did not have an exhibit list — to try to get it into the evidence at this point in time.

THE COURT: It didn't occur to you that it might be relevant on the issue of secondary meaning or functionality, or it might bear directly and immediately on the examination of Mr. Izumi?

MR. HOFFMAN: No, it did not, nor do I think does it bear on that issue, Your Honor, as indicated —

THE COURT: You don't think it bears on the ability to cross examine Mr. Izumi?

MR. HOFFMAN: It bears on the —

THE COURT: The application at this point?

MR. HOFFMAN: It does bear on the issue of ability to try to impeach Mr. Izumi. I don't think its dispositive of any issue. I think it's only, at most, of tangential relevance.

At that point in time, during trial, when we became aware of it, none of those issues came up, none of those thoughts crossed my mind. The only thought was can I get it in to use it; decided there is no way, and dropped it.

THE COURT: Tell me, what was your thought process?

MR. HOFFMAN: My thought process?

THE COURT: Yes.

MR. HOFFMAN: Outrage. I had asked for this. Why wasn't I told?

Second thought, can I get it into evidence? It will make a great argument to show the differences, to show a lack of likelihood of confusion.

THE COURT: Why didn't you try and offer it, then?

MR. HOFFMAN: Your Honor, a document — I don't have an exhibit list — that even though Mr. Izumi didn't know about it until trial, the patent agent that dealt with him in Japan knew about it, never showed us — Your Honor, I just thought I would be crucified even trying — and justifiably — even trying to put it into evidence, and dropped the idea. I figured there was no way that I was entitled to get that into evidence, and why even to bring up the point —

THE COURT: It never had occurred to you that, at best, it was a two-edge sword?

MR. HOFFMAN: No.

THE COURT: All right.

MR. HOFFMAN: Unfortunately, if it would have occurred to me, I would have produced it immediately. Just to put it in for whatever its worth.

THE COURT: With whom did you discuss this tactical decision?

MR. HOFFMAN: Of not putting — not trying to offer it?

THE COURT: Uh-huh.

MR. HOFFMAN: Mr. Saber (phonetic), with several other people that were in the room, in which were working in an adjacent room, and I know I have gone back and tried to resurrect my recollection. In one of my affidavits I listed several people. I believe I discussed it with Cy Hornsby of

Hornsby & Wisner (phonetic). I possibly discussed it also — and my recollection gets a bit vague — but I believe either with Gary Jones or Jim Vogler, and the existence of it briefly, I believe I might have mentioned it to Ed Foote — Mr. Foote, the existence.

The basic decision, not to even try, was a decision by myself, taken with brief consultation of others, and the issue died at that point. It never went further —

Transcript, June 17, 1987, Hearing at 40-43.

⁴While Izumi maintained at trial that the design of the Ronson RR1 and RR2 was dictated by functional concerns, Izumi now argues that “functionality” was not really an issue at trial. See Defendants’ Opposition at 13 n.10.

**APPENDIX F — DECISION BY THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT
IN *U.S. PHILIPS CORP. v. WINDMERE CORP.*,
861 F.2d 695 (FED. CIR. 1988)**

[Caption Omitted in Printing]

November 14, 1988.

Razor manufacturer brought trademark infringement action against competitor. Competitor counterclaimed for violation of the Sherman Act. The United States District Court for the Southern District of Florida, 680 F. Supp. 361, Stanley Marcus, J., granted directed verdict for manufacturer, and competitor appealed. The Court of Appeals, Friedman, Circuit Judge, held that there was sufficient evidence to submit antitrust claims to jury.

Reversed and remanded.

Pauline Newman, Circuit Judge, filed dissenting opinion in which Markey, Chief Judge, joined.

Forrest Hainline, Swidler & Berlin, Chartered, Washington, D.C., argued for plaintiffs-appellees Philips and N.A.P. With him on the brief was Timothy A. Ngau.

William E. Willis, Sullivan & Cromwell, New York City, argued for plaintiffs-appellees N.V. Philips. With him on the brief were John L. Hardiman, Garrard R. Beeney and Veselin M. Scekcic.

Edward Foote, Winston & Strawn, Chicago, Ill., argued for defendant-appellant Windmere. With him on the brief was R. Mark McCareins. Also on the brief were Cyrus H. Hornsby and Gary R. Jones, Hornsby & Whisenand, Miami, Fla., of counsel.

Before MARKEY, Chief Judge, FRIEDMAN, SMITH, NEWMAN and MAYER, Circuit Judges.

FRIEDMAN, Circuit Judge.

This case involves electric shavers. Windmere Corporation (Windmere) appeals from a final order of the United States District Court for the Southern District of Florida directing a verdict in favor of U.S. Philips Corp. and North American Philips (collectively Philips) on Windmere's antitrust counterclaims, 680 F.Supp. 361. Because we hold that there was sufficient evidence to submit the antitrust claims to the jury, we reverse and remand for a new trial on those claims.

I.

A. The Proceedings in the District Court.

In October 1984, Philips filed suit in the district court against Windmere and Izumi Seimitsu Kogyo Kabushiki Kaisha (hereinafter Izumi) (a Japanese corporation) for infringement of Philips' electric shaver patent and against Windmere for unfair competition. Windmere filed a counterclaim alleging that Philips had monopolized and attempted to monopolize the electric rotary shaver market, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2 (1982), and that Philips and Dutch Philips (N.V. Philips Gloeilampenfabrieken) had conspired to restrain trade in that market, in violation of Section 1 of that Act, 15 U.S.C. §1 (1982). Windmere apparently has abandoned its Section 1 claim.

Both the antitrust and the patent issues were tried to a jury. At the close of Windmere's antitrust case, the district court granted Philips' motion for a directed verdict on those issues. The court submitted the patent and unfair competition issues to the jury, which ruled

for Philips on the patent claim and for Windmere on the unfair competition claim. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the court certified its order directing a verdict on the antitrust counterclaim as final and therefore appealable.

B. The Evidence Relating to the Antitrust Counterclaim.

1. *The product involved.* Philips sells, among other things, electric shavers under the NORELCO and the SCHICK brand names. There are two styles of electric shavers: rotary and foil. Rotary shavers use high-speed rotating cutters under a circular comb. Foil shavers use vibrating blades under an etched metal foil. Rotary shavers are either cordless rechargeable models or less expensive corded models.

Philips introduced its Norelco rotary shaver in 1948. The first model contained a single head. This was followed by a double- and then a triple-headed shaver; Philips introduced the latter in 1966. The Norelco triple-headed rotary shaver accounts for at least 75 to 80 percent of Philips' total shaver sales. In 1981, Philips purchased the rights to the SCHICK trademark and used it to market its foil shaver.

2. The rotary shaver market.

a. *The relevant market.* Philips does not dispute that there was sufficient evidence upon which the jury could have concluded that for antitrust purposes electric rotary shavers constituted a separate market from electric foil shavers. There also was evidence that shavers priced above \$30 constituted a separate market from those priced below that amount. Philips has tended to concentrate on the higher priced models, which generally are

the cordless or rechargeable shavers. In 1983, the year before Windmere entered the electric shaver market with its Ronson shaver, Philips had 72.8 percent of the sales of above-\$30 shavers.

b. *The concentration of that market.* Prior to the entry of Windmere and Sears Roebuck into the rotary shaver market, Philips' Norelco shaver was the only product there. Mr. Gould, Windmere's economist expert, who had worked for the Census Bureau and the Department of Justice, estimated that "in 1985 the Norelco share of the rotary market was of [sic] the order of ninety percent." Gould, who had studied the concentration ratios of more than 400 industries, testified that Norelco's share of the rotary market was "the highest figure I have encountered in all of my studies Going back thirty years."

c. *Barriers to entry.* There was evidence that a recognized brand name was critical to successful entry into the electric shaver market. In 1977, Windmere first attempted to market a foil shaver and used the manufacturer's name (Payer). The name was not well-known, and the shaver line was discontinued. The president of Windmere testified that Windmere's customers advised them "that there was no way we could be in the electric shaver industry without a brand. Windmere doesn't qualify as a national brand that was known in the electric shaver business which is what they told us what [sic] we needed." Although this testimony was admitted with a limiting instruction that it was allowed to show only "state of mind" and not the "truth of the answer," the fact that Windmere believed that it needed a brand name to succeed in the market is evidence that such a name was necessary.

Philips became aware in February 1980 that Windmere had reached "an understanding" to acquire the SCHICK brand name. Philips subsequently predicted that if anyone brought the SCHICK name and used it to market Izumi rotary shavers, as Windmere was attempting to do, Philips would lose \$15 million in sales and \$2 million in profit during a three-year period, as well as five points in market share. Philips then bought the rights to the SCHICK brand name and used it to begin marketing a line of foil shavers. A Philips memorandum titled "FOIL SHAVER MARKETING OPPORTUNITY" noted that one "of the factors which have influenced our decision not to market this line [foil shavers] in the past" was because

we [Philips] have been unwilling to commit the tens of millions of dollars required to establish an entirely new shaver brand in the U.S. market.

Now, however, we are faced with a unique opportunity which may never come our way again. An established brand name is available for a relatively small investment. Virtually all roadblocks which have stood in the way of the foil line are eliminated by the availability of the brand name — SCHICK.

Philips' own economist expert testified that entry into Windmere's proposed markets was relatively easy. Philips also relied on the fact that following Windmere's entry into the rotary shaver market in 1984, Windmere obtained 3 to 5 percent of the total electric shaver market.

d. *Windmere's entry into the rotary shaver market and Philips' response.* As noted, in 1977 Windmere unsuccessfully had attempted to enter the foil shaver market. In the spring of 1984, Windmere again entered the electric shaver market with both foil and rotary shavers manufactured in Japan, which Windmere sold under the RONSON trademark.

Windmere introduced a cordless rotary (model RR-1) shaver for \$34.99 and a corded rotary (model RR-2) shaver for \$22. Windmere projected that, during its first six months in the shaver business, it would sell 125,000 razors for total dollar sales of more than \$3 million. In the last nine months of 1984, Windmere actually sold more than 300,000 units for approximately \$6 million. Windmere's 1984 annual report, prepared after it had filed its antitrust counterclaim, stated that "[d]espite a substantial loss of sales and revenues resulting from Philips, i.e., Norelco's business tactics, the Ronson electric shavers represent the most successful new product line introduction in the history of the Company."

Philips had described Windmere as "a financially extremely healthy enterprise which is capable of making life very difficult for us." A Philips "report of decision taken at a management policy meeting" on January 5, 1984, stated: "If Windmere launches rotary shavers on the U.S. market, Mr. Beasley [vice president of marketing for North American Philips Consumer Product Division] proposes to kill this stone dead by introducing old models at very low prices"

After Windmere introduced its Ronson shavers at a price lower than Philips' shavers, an April 20, 1984 Philips weekly report, for the week ending April 21, 1984, stated: "Ronson is getting a solid foothold and apparently is willing and able to pay a high price to get into our business. Let's pound them into the sand." The report suggested that Philips introduce the model "1320" cordless rotary shaver. The model 1320 was Philips' old model 1312, which had an expected retail price of \$44 during 1979 to 1980.

The model 1320, however, was introduced at a distributor price of \$27.08, which was approximately 31 percent less than the \$39 price at which the same razor had been sold as the model 1312 four years earlier, and approximately 23 percent less than the comparable Ronson model. The introduction of the model 1320 was not mentioned in Philips' 1984 business plan, dated December 1983. Until the 1320, Philips had never introduced a new product at a lower price point.

Philips discussed the 1320 shaver in a March 1984 memorandum:

Until later in the year, Norelco has decided on an absolute embargo on any form of publicity in connection with the introduction of the HP 1320 The negative effect of any premature release of information on the HP 1320 or 1337 is feared, just at the very time when the intention is to introduce the 1320 as a complete addition to the line and not for it to take sales away from any of the existing range of standard shavers The question was asked whether it was the intention to include the 1320 in the line for 1985. Beasley and Co. have taken no clear position on this subject. *Given the likely impossibility of driving Windmere off the U.S. market completely*, we foresee that a non-retracting rechargeable shaver sold at an aggressive price level will persist on the market for a rather longer time and thus cannot be viewed as an incidental phenomenon, so to speak (emphasis added).

Philips later described the 1320 model as a "200th anniversary special to be out for a limited period of time."

A May 24, 1984 Philips memorandum stated: "As discussed at the policy meeting, we should attempt to

formulate a short term strategy with regard to the competition represented by the Ronson trademark, which in the hands of Windmere Inc. of Florida has penetrated our market segment." The memorandum refers to a marketing strategy wherein

[a] direct frontal attack on Ronson in the marketplace is probably the crudest and probably also one of the most expensive means at our disposal. This would involve, for example, us locating competing dealers at every address where Ronson is sold and selling Norelco and/or Philips shavers at a lower price. Furthermore, every challenge issued by Ronson in the form of actual discounts would have to be countered by offering even lower discounts.

We can reward exclusivity by giving every dealer who does not sell Ronson shavers an extra discount of 5%.

....

Total attack strategy, that is to say that just as Norelco is now doing, we would launch a multiplicity of activities against Windmere and at a later stage against any other competitor who appears on the scene.

The memo concludes that "legal measures" "should make life difficult for Ronson on every front where it is at all possible, on the basis of our patents" and that as a "tactical measure" Philips should "[b]uy Izumi, and quickly."

Windmere presented testimony that, after Philips introduced its model 1320, substantial orders (\$2-2.5 million) were cancelled. No orders for Ronson products had been cancelled before the Philips 1320 was introduced.

The 1984 Philips marketing plan included a model 1615 corded rotary shaver. The 1615 was to have been

sold to distributors for \$27.99, who then would have sold the shavers at a retail price of \$29.99. The price of the 1615, however, was dropped approximately 35 percent to a distributor price of \$18.03, which was almost \$4 less than the distributor price for Ronson's comparable corded rotary shaver.

Philips' response to Windmere's entry affected other models in its line. In its "Model policy 1985," discussed in May 1984, a twin-head model "1722" apparently was scrapped:

Mainly on account of the action undertaken against Ronson as well as because of the very presence of Ronson on the market with its known price advantages, there is less room for this product on the American market than had been originally planned.

Another model, the "1622," was also affected:

Although . . . this should be an expensive model on account of the enhanced specification compared with the HP 1620, it appeared from the discussion of this point that the matter of price was more important than the question of the specification. Norelco maintained their view despite the poor way in which sales of the HP 1620 had held up, even in the USA as well. Later the product discussion turned to the question of a frontal attack on Ronson. In this context, Groningen [Dutch Philips] quite clearly declared it was ready to drop the price of this product even below that of the HP 1620 (\$8.15) provided that Norelco were ready to drop their gross margin by a considerable amount. Such a frontal attack on Ronson must certainly be accompanied by considerably more volume

In March 1985, one year after Windmere entered the electric shaver market, a Philips memo of a sales meeting

and visits to buyers noted the damaging effect the 1615 and 1320 had on sales of other Philips models:

The HP 1615 and the HP 1320 clearly eat in on the HP 1337, HP 1327D and the HP 1604/05/06. This is a dramatic development since it appears that the HP 1615, at a price point of \$19.95 will be a disturbing development. It is clear that this is a planned development and that we cannot occupy ourselves "crying over spilled milk," but the fact remains nonetheless.

e. Philips' alleged predatory pricing. Windmere contended that Philips sold its 1320 and 1615 models below its average variable costs and sacrificed its short-term profits on those models in order to drive Windmere out of the rotary shaver market. Windmere and Philips introduced into evidence various calculations directed to the question whether Philips sold below cost. As the parties framed the issue, the answer depended upon which of Philips' costs properly were allocable to those two models.

The parties vigorously disputed whether Philips' advertising expenses were a variable cost of those models and, if they were, the basis upon which advertising expenses should be allocated. Philips contended that there should be subtracted from the \$17.5 million it spent for advertising in 1985 the approximately \$6.6 million it received for advertising in that year from its Dutch parent, N.V. Philips. If that subtraction were made, there was evidence that Philips made a profit on the sales of the shavers. Philips also argued that advertising expenses should have been allocated as a percentage of expenses based upon revenues — an allocation under which Philips would have made a profit. Windmere disputed these assumptions

and calculations based on them. Each side presented evidence justifying and supporting its position.

The parties also disputed the allocation of costs other than advertising. For example, Windmere relied upon its projections of Philips' 1985 costs of batteries, freight and handling. Philips contended that based on its actual, as distinguished from projected, costs for those items, it realized a profit on its sales. Windmere responded that because Philips' actual costs were not available to it, its calculations based upon projected costs were a reasonable basis for determining whether Philips' sales were at a profit.

f. Windmere's withdrawal from the rotary shaver market. In December 1985, less than two years after it introduced its Ronson rotary shaver, Windmere announced its withdrawal from the rotary shaver market. (It remained in the foil market.) Shortly thereafter, Philips discontinued the sale of its 1320 and 1615 rotary shavers. At a 1986 housewares show, Philips stated that "[t]hey were closing [the model 1320] out and coming out with a new model at a higher price."

C. The Decision of the District Court Directing a Verdict on the Antitrust Counterclaim.

In an opinion explaining "in detail" its "reasons for granting" Philips' motion for a directed verdict, the district court stated that "reluctantly" it had found that "Windmere had failed to present substantial evidence sufficient to create a jury question on at least one element of its antitrust claims — the willful acquisition or maintenance of monopoly power via predatory pricing. . . ." (footnote omitted).

The court ruled that "Windmere presented a substantial amount of evidence to support its definition of the relevant market and to show that [Philips] had market power in this market." The court stated that "[t]he specific conduct which Windmere alleged was anticompetitive and showed Philips' intent to monopolize, was Philips['] alleged predatory pricing scheme with regard to the sale of its model 1320 and 1615 rotary electric razors." The court held that under *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976), Windmere was required to show that Philips was " 'charging a price below [its] average variable cost in the competitive market,' " (quoting 517 F.2d at 724) and that "Windmere's evidence of below-cost pricing does not meet the substantial evidence standard necessary to withstand a directed verdict."

The court stated:

The disputes regarding the evidence Windmere introduced to prove predatory pricing involve two primary issues: (1) the proper allocation of Philips['] advertising expenditures, and (2) the proper method of proving costs — i.e., by using actual costs or projections.

The court further stated that it was "undisputed that if all of Philips['] advertising expenditures are classified as fixed costs, that Philips['] prices for the model 1320 and 1615 razors exceeded their average variable cost." The court noted the testimony of Mr. Kamerschen, Philips' expert, that "based on his review of Norelco's business and media plans, which he stated contained the type of information an economist would generally rely upon in order to make a judgment of this kind, that Norelco's

advertising was a fixed cost," and stated that "Windmere failed to bring forth any information to the contrary on the cross-examination of this witness" (record reference omitted). The court ruled that the evidence upon which Windmere relied to show that advertising was a variable expense — Norelco's "1984 income statements . . . which listed advertising in a category entitled variable expenses" — was insufficient because "such an accounting record cannot alone support the classification of advertising as a variable expense for economic purposes" (record reference omitted).

The court further held that "[e]ven assuming, however, that advertising expenses here are properly characterized as variable costs, there is a question whether cooperative advertising support given to Norelco by NVP should be deducted before determining whether Norelco priced the 1615 and 1320 below its average variable cost." It rejected, as "wholly unsupported" by the evidence, Windmere's "contention" that the approximately \$6.6 million Philips received "in advertising support from NVP in 1985" either was not actually paid or was in addition to and not a part of the \$17.5 million Norelco spent for advertising in 1985. The court also held that Windmere had not introduced sufficient evidence to justify submitting to the jury Windmere's contention that the advertising expenses should be allocated to the 1615 and 1320 models "on a per unit basis" (footnote omitted). Finally, the court rejected Windmere's evidence of the cost of batteries, freight and handling because that evidence was based on "projections of the 1985 year" (emphasis in original).

II

A. This court has exclusive jurisdiction over an appeal from a final judgment where the jurisdiction of the district court was based in whole or in part on 28 U.S.C. §1338(a) (1982). 28 U.S.C. §1295(a)(1) (1982). In filing its complaint against Windmere and Izumi for patent infringement, Philips invoked the jurisdiction of the district court under section 1338(a). Although Windmere's antitrust counterclaim, which is the subject of this appeal, did not invoke the district court's jurisdiction under that section, our appellate jurisdiction depends upon the nature of the case in the district court and not upon the issues presented to us for review. See *In re Innotron Diagnostics*, 800 F.2d 1077, 1080, 231 USPQ 178, 180-81 (Fed. Cir. 1986) ("the mere presence in a case of 'issues' other than those within a substantive field within this court's exclusive appellate jurisdiction [does not] oust this court of the jurisdiction it must and would otherwise exercise in carrying out its mission."); see also *Atari, Inc. v. JS & A Group, Inc.*, 747 F.2d 1422, 1431, 223 USPQ 1074, 1080 (Fed. Cir. 1984) (en banc).

In the present case, the jurisdiction of the district court over this case was based in part on section 1338(a). That fact gives us jurisdiction over this appeal, even though the appeal presents no questions under the patent laws. See, e.g., *In re Innotron Diagnostics*, 800 F.2d at 1080, 231 USPQ at 180 (where patent complaint was consolidated with antitrust complaint, the Federal Circuit had exclusive jurisdiction over appeal from final judgment); *Cable Elec. Prods., Inc. v. Genmark, Inc.*, 770 F.2d 1015, 1029, 226 USPQ 881, 890 (Fed. Cir. 1985) (where district court exercised jurisdiction over patent count under §1338(a), the Federal Circuit has jurisdiction, under §1295(a), to review the appeal of the non-patent counts).

B. In determining whether the district court correctly directed a verdict on Windmere's antitrust counterclaim, we apply the law of the regional circuit in which the district court sits to determine both the appropriateness of a directed verdict and the antitrust law questions. *Power Controls Corp. v. Hybrinetics, Inc.*, 806 F.2d 234, 237, 231 USPQ 774, 776 (Fed. Cir. 1986); *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 875, 228 USPQ 90, 99 (Fed. Cir. 1985) ("We must approach a federal antitrust claim as would a court of appeals in the circuit of the district court whose judgment we review."); *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1574-75, 223 USPQ 465, 471 (Fed. Cir. 1984).

We thus "apply [Eleventh] Circuit law primarily and look to guidance (albeit nonbinding) from other circuits, especially in uncharted areas." 781 F.2d at 875, 228 USPQ at 99-100. Since the Eleventh Circuit treats as binding decisions of the Fifth Circuit rendered before October 1, 1981, when the Eleventh Circuit came into being, *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), we also apply those earlier Fifth Circuit decisions.

In the Eleventh Circuit, "[t]o avoid a directed verdict, [Windmere] must have presented sufficient evidence to create a jury question with respect to each element of [its] case." *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 848 (5th Cir. Unit B April), cert. denied, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981).

In determining whether there is sufficient evidence to submit a case to the jury following a motion for directed verdict, the district court should consider all evidence and not just evidence supporting the non-mover's case. The evidence must be considered in the light and with all reasonable

inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable persons could not reach a different conclusion, the Court should direct a verdict.

Gregory v. Massachusetts Mut. Life Ins. Co., 764 F.2d 1437, 1440 (11th Cir. 1985). See also *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc) (for evidence to be sufficient to create a jury question it must be of a quality and weight that reasonable, impartial, and fair-minded jurors might reach different conclusions).

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the Supreme Court held that the standard for granting summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Id.* at 250-51, 106 S.Ct. at 2511 (citation omitted). The Court pointed out that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255, 106 S.Ct. at 2513.

III

"The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966). The district court recognized, and Philips does not dispute, that "Windmere presented a substantial amount of evidence to support its definition of the relevant market [rotary electric shavers] and to show that [Philips] had market power in this market." The question before us, therefore, is whether Windmere presented sufficient evidence to entitle it to go to the jury on the second element of monopolization: whether Philips willfully had maintained its monopoly power in the rotary shaver market.

The district court viewed the essence of Windmere's case on the second element as "the willful acquisition of maintenance of monopoly power via predatory pricing," and used, as the standard for determining "predatory pricing," pricing "below average variable cost." The court concluded that Windmere had failed to present substantial evidence that Philips had priced its 1615 and 1320 rotary shavers below Philips' average variable costs.

We conclude, however, that the district court took too narrow a view of the kind of evidence that will support the second element of monopolization and of the bases of Windmere's claims. Moreover, even under the district court's narrow view of Windmere's theory, Windmere presented sufficient evidence of predatory pricing to preclude a directed verdict on that issue.

A. There was evidence from which the jury could have concluded:

1. That entry barriers to the rotary electric shaver market are substantial, if not high — the need to have a well-known brand with wide consumer acceptance, the limited number of brands that satisfy this requirement, and the substantial advertising expenditures required to attain a foothold in the market.

2. That Philips introduced its lower-priced older models only in response to Windmere's entry into the market with its cheaper Ronson rotary electric shaver.

3. That Philips cut the price of its shavers in an endeavor to eliminate Windmere from the market. Mr. Beasley proposed that if Windmere started selling rotary shavers in the United States market, Philips should "kill this stone dead by introducing old models at very low prices" A Philips weekly report, made after Philips had introduced its rotary shaver, suggested: "Let's pound them into the sand." A Philips memorandum referred to "the likely impossibility of driving Windmere off the U.S. market completely" Although Philips attempts to discredit this evidence as mere sales talk, it was for the jury to determine what weight and significance this evidence had.

That this purpose of Philips was further shown by the evidence that, when Windmere withdrew from the rotary shaver market, Philips promptly discontinued the sale of its lower-priced old model.

4. That Philips' willful maintenance of its monopoly position was further shown by Philips' prior acquisition of the SCHICK brand name after it had learned about an understanding between Windmere and Schick for Windmere to acquire that name.

To be sure, Philips introduced evidence designed to show that its actions were legitimate competitive responses prompted by the entry of Windmere into the market. The evaluation of all the evidence bearing on the nature of Philips' actions and the inferences to be drawn from the evidence, was for the jury to determine. If the jury had credited Windmere's evidence and rejected Philips', it could have returned a verdict for Windmere. Evidence that a firm holding 90 percent of a market that has substantial entry barriers drastically slashes its prices in response to the competition of a new entrant, for the purpose and with the effect of eliminating that entrant, is sufficient to show monopolization, in violation of section 2 of the Sherman Act. *Cf. Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11, 105 S.Ct. 2847, 2861-62, 86 L.Ed.2d 467 (1985); *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946).

B. Even under the district court's view that Windmere's case rested on its claim that Philips had sold below average variable cost, the evidence was sufficiently in conflict to require submission of the issue to the jury and precluded a directed verdict. As the district court noted, the determination whether Philips sold below average variable cost required resolution of two issues: (1) whether Philips' advertising expenses were variable or fixed costs and, if variable, whether the advertising allowance Philips received in 1985 from its Dutch parent should be deducted from Philips' own advertising expenditures; and (2) whether Windmere's projections for certain items of Philips' cost — batteries, freight and handling — were sufficient to establish those costs. The district court held that on both of these elements of its case, Windmere failed to present sufficient evidence to create disputed factual issues for the jury. We disagree.

1. In ruling that Windmere had not presented substantial evidence that Philips' advertising expenses were variable rather than fixed costs to create a jury question on that issue, the district court relied on the testimony of Philips' economist expert, Mr. Kamerschen, that the Norelco advertising was a fixed cost, and stated that "Windmere failed to bring forth any information to the contrary on the cross-examination of this witness." It was for the jury, however, and not for the court, to determine the credibility of this witness and the weight to be given his testimony. The jury was not required to accept his expert testimony, even if it was uncontradicted. See *Quock Ting v. United States*, 140 U.S. 417, 420, 11 S.Ct. 733, 734, 35 L.Ed. 501 (1891) ("There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony."). See also *Archer v. Commissioner*, 227 F.2d 270, 273 (5th Cir. 1955); *Boyett v. Commissioner*, 204 F.2d 205, 208 (5th Cir. 1953).

To counter Mr. Kamerschen's opinion, Windmere relied on Norelco's 1984 income statements, "which listed advertising in a category entitled variable expenses." The court rejected this evidence as insufficient to create an issue for the jury because "[i]t is clear that such an accounting record cannot alone support the classification of advertising as a variable expense for economic purposes." As was the case with Mr. Kamerschen's expert testimony, however, this was evidence that the jury was entitled to consider in determining whether the advertising expenses were variable or fixed costs. Indeed, the Areeda and Turner antitrust treatise, which the district court cited as authority for rejecting Philips' own characterization of its advertising expenses

as variable costs, states that "we have defined marginal and average variable cost to include advertising and other promotional expenditures." 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 721a, at 191 (1978).

Similarly, we conclude that, in determining the amount of Philips' advertising expenses that are variable costs, the proper treatment of the approximately \$6.6 million Philips received from its Dutch parent in 1985 was an issue for the jury to decide.

2. The question whether Philips advertising expenses should be allocated to the 1615 and 1320 models on a per unit basis or on the basis of revenue received also was a matter for the jury and not for the court to decide. We reach that same conclusion with respect to the propriety of Windmere's use of 1985 projections, rather than Philips' actual operating costs (which apparently were not available to Windmere), to determine Philips' costs of batteries, freight and handling.

IV

It is unfortunate that, as a result of our decision, the lengthy and complex issues involved in Windmere's antitrust counterclaim will have to be retried. That, however, is the consequence of the district court's directing a verdict rather than allowing the case to go to the jury. As the Eighth Circuit stated, in language that applies equally to this case:

In short, the case was not clear enough to justify a directed verdict. If this case had been tried to the court, we would have had no difficulty in affirming, as not clearly erroneous, a finding for [Philips] supported by the opinion the District Court rendered here. But this case was not tried to the court. It

should have been permitted to go to the trier of fact.

Dace v. ACF Indus., Inc., 722 F.2d 374, 379 (8th Cir. 1983). The court continued in a footnote:

This case illustrates again that it is usually better practice for a district court, faced with a motion for directed verdict, to allow the case to go to the jury, and address the issue by way of judgment n.o.v. if necessary. The jury may find for the moving party, in which case the issue disappears. If the verdict is against the moving party, and if judgment n.o.v. is granted, and if this Court decides on appeal that it should have been denied, the verdict can simply be reinstated, and no new trial is necessary.

Id. at 379-80 n.9. *Accord Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 166 n.2 (2d Cir. 1980); *Jamesbury Corp. v. Litton Indus. Prods., Inc.*, 839 F.2d 1544, 1550, 5 USPQ2d 1779, 1784 (Fed. Cir. 1988).

CONCLUSION

The order of the district court granting a directed verdict against Windmere on its antitrust counterclaim is reversed, and the case is remanded to the district court for a new trial on that counterclaim.

REVERSED AND REMANDED.

PAULINE NEWMAN, Circuit Judge, with whom MARKEY, Chief Judge, joins, dissenting.

I respectfully dissent, for I believe that the district court correctly directed a verdict in favor of the Philips companies with respect to the asserted violation of Section 2 of the Sherman Act.

Perhaps a more cautious, or less confident, style of trial management would have been to allow the jury to reach a verdict and then review the decision. However, the law of the Eleventh and Fifth Circuits fully supports the procedure followed. *See, e.g., J & H Auto Trim Co. v. Bellefonte Insurance Co.*, 677 F.2d 1365, 1368 (11th Cir. 1982) ("There must be a conflict in substantial evidence to create a jury question.") (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (en banc)); *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 848 (5th Cir.) (the non-moving party must present evidence sufficient to create a jury question as to each element of the claim), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981).

In a carefully reasoned opinion, applying the standards of the Supreme Court and the Eleventh and Fifth Circuits, the district court held that Windmere's evidence was "simply insufficient to permit the trier of fact to find facts in connection with this matter". Review of the record and arguments shows that the district court was correct when it held that, as a matter of law, Windmere had not adduced sufficient evidence to support a jury verdict in its favor on the asserted Section 2 violation. The most stalwart defender of jury trials must also defend the authority of the trial judge to manage the trial and, when appropriate, to direct the verdict. *Galloway v. United States*, 319 U.S. 372, 392-95, 63 S.Ct. 1077, 1088-90, 87 L.Ed. 1458 (1943).

A

In response to a suit for patent infringement and for unfair competition (based on trade dress), Windmere asserted a counterclaim of monopolization and attempt to monopolize against the Philips companies under Sec-

tion 2 of the Sherman Act. Other antitrust counter-claims, also decided against Windmere on the ground of insufficient evidence, are not before us.

The district court stated that "Windmere had failed to present substantial evidence sufficient to create a jury question on at least one element of its antitrust claim — the willful acquisition or maintenance of monopoly power via predatory pricing". The district court held, correctly, that unless Windmere were able to create a jury question on this element, Windmere could not prevail on its Sherman Act charge. See *Malcolm v. Marathon Oil, supra*.

The court thus concentrated on Windmere's evidence on the issue of predatory pricing and concluded that, as a matter of law, Windmere had not presented sufficient evidence to create a jury question on the essential premises thereof. Applying *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966), the district court observed that it is not illegal to lower one's price in view of competition, (or in this case to bring in additional models at low price, without lowering the price of the existing models) unless in so doing the pricing is "predatory". The applicable law on determination of predatory pricing has recently been reviewed in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117 n.12, 107 S.Ct. 484, 492 n.12, 93 L.Ed.2d 427 (1986), as follows:

No consensus has yet been reached on the proper definition of predatory pricing in the antitrust context, however. For purposes of decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 [106 S.Ct. 1348, 89 L.Ed.2d 538] (1986), for example, we defined predatory pricing as either "(i) pricing below the level necessary to

sell their products, or (ii) pricing below some appropriate measure of cost." *Id.*, at 585, n.8 [106 S.Ct. at 1355, n.8]. Definitions of predatory pricing also vary among the Circuits. Compare *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1056-57 (CA 6) (pricing below marginal or average variable cost presumptively illegal, pricing above such cost presumptively legal), cert. denied, 469 U.S. 1036 [105 S.Ct. 511, 83 L.Ed.2d 401] (1984), with *Transamerica Computer Co. v. International Business Machines Corp.*, 698 F.2d 1377 (CA 9) (pricing above average total costs may be deemed predatory upon showing of predatory intent), cert. denied, 464 U.S. 955 [104 S.Ct. 370, 78 L.Ed.2d 329] (1983).

The district court, following this direction, looked to the precedent of its own circuit for elaboration of the method of determining predatory pricing. In *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), cert. denied, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976), the Fifth Circuit held:

In short, in order to prevail as a matter of law, a plaintiff must at least show that either (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible. [footnotes omitted]

The first of the two *International Air* tests, pricing below average variable cost, was the lesser standard for Windmere to meet. It is a commonly used test for predatory pricing in the Fifth Circuit, see, e.g., *Adjusters*

Replace-A-Car Inc. v. Agency Rent-A-Car Inc., 735 F.2d 884 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 910, 83 L.Ed.2d 924 (1985); and in other circuits, *see, e.g., MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.) (criticizing the profit maximizing test), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983); *Northeastern Telephone Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 87-88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1438, 71 L.Ed.2d 654 (1982); *Southern Pacific Comm. Co. v. American Tel. & Tel. Co.*, 556 F.Supp. 825, 927, 964 (D.D.C. 1982), *aff'd*, 740 F.2d 1011 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985).

From the record and argument, it is apparent that Windmere's only way of attempting to show price below average variable cost was by including Philips full advertising costs as variable costs, attributed per unit to the reintroduced obsolete models 1320 and 1615. Although the parties argue the point on this appeal — the majority opinion refers to a "vigorous dispute" — the district court looked to the evidence.

The district court found that Windmere had presented "no record evidence" to support either its method of allocation of advertising costs or its challenge to the total advertising expenditures; and that on Norelco's established advertising expenditures of \$17,558,000, of which \$6.6 million was paid by NVP, "even according to the testimony of Windmere's Vice President of Finance, Burton Honig, Norelco achieved a profit on the sale of the 1320 and 1615 in 1985". Although Windmere argues the arithmetic on appeal, there was no evidence

to the contrary. Argument of counsel is not evidence, as the Fifth Circuit has discussed:

Unsupported, self-serving testimony is not substantial evidence sufficient to create a jury question. *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1371 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977). Similarly, inferences can not stand in the face of uncontradicted and substantial evidence to the contrary. *Scott Medical Supply Co. v. Bedsole Surgical Supplies, Inc.*, 488 F.2d 934, 937 (5th Cir. 1974).

Comfort Trane Air Conditioning Co. v. Trane Co., 592 F.2d 1373, 1383 (5th Cir. 1979). *Accord Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 858 (9th Cir. 1977), *cert. denied*, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978) (affirming directed verdict for a defendant on a predatory pricing claim because of the inadequacy of plaintiff's accounting evidence: "a firm's marginal costs cannot be ascertained from conventional business records. Conventional records do not provide information which a jury can use as evidence of marginal cost.")

The district court remarked on the absence of evidence of any advertising whatsoever of the 1615 and 1320 models; and the court observed that Windmere had the burden of proof. Referring to Windmere's reliance on its proposed projections of Philips' costs rather than actual cost data, the district court held that "[a]lthough some use of projections undoubtedly is necessary, we find that where such use alone makes the difference between a loss or a profit on an item that use is too extensive." The district court cited the Supreme Court in *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475

U.S. 574, 589, 106 S.Ct. 1348, 1357, 89 L.Ed.2d 538 (1986) on the necessity of "direct evidence" of predatory pricing schemes.

Following the guidance of *Matsushita*, the district court concluded that "Windmere's evidence of below-cost pricing does not meet the substantial evidence standard necessary to withstand a directed verdict." No error has been shown in the district court's careful analysis of the evidence presented, or in its conclusion that the minimum evidentiary standards on which a jury could have reached a verdict of predatory pricing had not been met.

B

Windmere argues in the alternative that the district court should have applied to its pricing analysis the second standard of *International Air*, 517 F.2d at 724, viz. that "the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible". The Fifth Circuit Court explained the profit maximizing test as follows:

This standard should be applied only when the barriers to entry are extremely high. The lower the barriers to entry in a market, the closer to marginal cost a monopolist would have to set its price in order for a plaintiff to prevail as a matter of law, for we see no social utility in insuring the survival of inefficient firms where a new entry is possible.

International Air, 517 F.2d at 725 n.31.

The district court did not rely in its decision on the presence or absence of barriers to entry, presumably because Windmere did not argue that it encountered any

actual barriers. It was undisputed that the Izumi shavers, labeled with the Ronson trademark, experienced no entry barriers whatsoever. In its first year Windmere sold six million dollars' worth, double its projections. In its 1984 Annual Report Windmere stated:

The most exciting new product introduced in 1984 was the Ronson shaver line, which included three microfoil and two rotary shavers. We were successful in gaining distribution of our shavers to many of the major retailers in America. This was the most successful product introduction in the Company's history.

Windmere's sole argument as to entry barriers is based on its reference to negotiations for the Schick trademark — an event whose significance is belied by Windmere's apparently ready acquisition of the Ronson mark, and its immediate market success. *Accord*, *D.E. Rogers Associates, Inc. v. Gardner-Denver Co.*, 718 F.2d 1431, 1434 (6th Cir. 1983), *cert. denied*, 467 U.S. 1242, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984) (ease of entry shows lack of barriers to entry). In addition, Windmere's Vice President of Sales testified that the Sunbeam brand name was available and could be used to market electric shavers.

Since Windmere did not meet the threshold burden, under the profit-maximizing test, of presenting evidence whereby a jury could find that it experienced high barriers to entry, I respectfully disagree with my colleagues' reliance on entry barriers as contributing substantial evidence for the jury: this is the first of the majority's four-point basis for remand for jury trial. Nor can I agree that it is probative of violation of the Sherman Act to introduce a lower-price model in response to a competitor's low-price model (the majority's second point); or to engage in vigorous price competition (the majority's third

point). The fourth point, on which the negotiations concerning the Schick trademark were relied on as evidence of intent to monopolize, even if established, is not probative without below-cost pricing. Industrial competition is not benevolent, and causing loss of profits to a competitor, or making the market less attractive to a competitor, whereby a less efficient or higher cost competitor leaves the market, is not itself a violation of antitrust law. As stated in *Ball Memorial Hospital, Inc. v. Mutual Hospital Ins.*, 784 F.2d 1325, 1338, 1339 (7th Cir. 1986):

[I]ntent to harm rivals is not a useful standard in antitrust Vigorous competitors intend to harm rivals, to do all the business if they can. To penalize this intent is to penalize competition.

Windmere's position, simply put, is that Philips was obliged to preserve its pricing at the levels of the *status quo ante*, and neither reduce its price nor bring in a lower-price model. Windmere refers approvingly to Remington's failure to reduce its prices when Windmere introduced its Ronson brand foil razor. Thus Windmere argues that Philips must be barred by the antitrust laws from pricing its obsolete 1320 and 1615 models at lower prices than those at which they had sold when they were the current models (the 1615 having been offered at \$28.00 some years before, and now reoffered at \$17.50), since the purpose was to offer these models at a lower price than that at which Windmere was offering the Izumi shaver.

It is not the law that Philips was required to preserve its prices and products as they were before Windmere offered the Izumi product at a lower price. "It is not anticompetitive for a company to reduce prices to meet lower prices already being charged by competitors.

Indeed, "[t]o force a company to maintain non-competitive prices would be to turn the antitrust laws on their head." " *D.E. Rogers*, 718 F.2d at 1435 (citations omitted) (quoting *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982)). The district court applied this principle in its statement that "[p]rice cutting between competitors as a general rule is precisely the type of conduct our laws are designed to promote." Pertinent is the Supreme Court's recent discussion in *Matsushita*, 475 U.S. at 594, 106 S.Ct. at 1360:

But cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. See *Monsanto*, supra [465 U.S. 752], at 763-764, 79 L.Ed.2d 775, 104 S.Ct. 1470 [at 1470-1471 (1984)]. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (CA 1 1983).

The district court considered Windmere's arguments as to the applicable precedent, including a careful analysis of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). The court, for the purpose of this motion, accepted Windmere's definition of the relevant market as limited to rotary shavers, but did not agree with Windmere that it is always a violation of the Sherman Act to reduce prices if the result is to "deliberately remove competitors", in Windmere's words, or that Philips was required to refrain from reacting to Windmere's importation of the Izumi product. The court, following *International Air*,

held that it is insufficient evidence of Sherman Act violation to show that a "large entrenched firm with a dominant market share", *id.* at 721, reduced its prices in "a program of stunting the possible growth of [the new entrant]". *Id.* at 719. The court held, as *International Air* requires, that it is also necessary to show that the sales were below average variable cost. *Id.* at 724. *It is not the law that a dominant company must make room for new entrants.*

The Fifth Circuit has discussed the role of intent, stating in *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 887 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 910, 83 L.Ed.2d 924 (1985) that:

A statement of intent to compete . . . even if perceived as a threat is not unlawful. Such a manifestation of intent to triumph in the competitive market, in the absence of unfair, anticompetitive or predatory conduct, is not enough to establish an antitrust violation.

(quoting *Hayes v. Solomon*, 597 F.2d 958, 977 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078, 100 S.Ct. 1028, 62 L.Ed.2d 761 (1980)). It is not the purpose of the antitrust laws to require that lawful monopolist "hold [] an umbrella over inefficient competitors". *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 375 (7th Cir. 1986), *cert. denied*, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1987).

Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches.

Id. at 375.

Philips was not required to limit its products to those pre-existing at higher prices, to provide an "umbrella" for the importation by Windmere of the cheaper Izumi model, or to refrain from selling an even cheaper model, even for a limited time. The standard of the Fifth and Eleventh Circuits is that an essential element of a Section 2 violation is proof of sale below a fair measure of cost, as discussed in *International Air*. We, sitting in review of the district court's application of Fifth/Eleventh Circuit law, are unauthorized to set a different standard.

C

The district court concluded that there was insufficient evidence to create a jury question on whether Philips was pricing the re-introduced models below cost. It was the trial court's obligation to assure that the jury was presented with evidence, not appeals to "passion and prejudice". *Connell v. Sears Roebuck & Co.*, 722 F.2d 1542, 1546 (Fed. Cir. 1983). The Court stated in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124, 89 S.Ct. 1562, 1577, 23 L.Ed.2d 129 (1969), that "speculation and guesswork" can not support a verdict of antitrust violation. *See also Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373, 1383 (5th Cir. 1979) (directed verdict granted when plaintiff failed to present substantial evidence that defendant's illegal antitrust activities were a material cause of plaintiff's injuries). *Accord Broadway Delivery Corp. v. United Parcel Service, Inc.*, 651 F.2d 122, 131 (2d Cir.), *cert. denied*, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981) (motion to dismiss after jury trial granted because plaintiff's proof "did not permit a reasonable fact-finder [to make] a careful assessment of the relationship between the defendants' prices and costs"); *MCI Communications*

Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1125, 1126, 1127 (7th Cir.) (affirming a directed verdict for defendant on a predatory pricing claim because of insufficient evidence), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983); *Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, 858 (9th Cir. 1977) (jury verdict set aside because of insufficient evidence of predatory pricing), *cert. denied*, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1979). See generally Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975).

The district court correctly concluded that Windmere had not adduced sufficient evidence to create a jury question of its Section 2 Sherman Act claim, as a matter of law. The court thus acted within its authority in directing the verdict on this issue, and should be affirmed.

APPENDIX G – PRETRIAL STIPULATION PURSUANT TO LOCAL RULE 14(D) FILED IN THE SOUTHERN DISTRICT OF FLORIDA, DATED JANUARY 18, 1990

[Caption Omitted in Printing]

**PRETRIAL STIPULATION
PURSUANT TO LOCAL RULE 14(D)**

I. NATURE OF THE ACTION

Plaintiff, N.A. Philips, claims that Windmere has competed unfairly by copying the overall appearance or trade dress of its Norelco razors in violation of 15 U.S.C. §1125, Section 43(a) of the Lanham Act. N.A. Philips seeks damages and injunctive relief.

Windmere has brought an antitrust counterclaim. Count I of Windmere's counterclaim alleges "Unlawful Attempt to Monopolize and Monopolization" and contends that plaintiffs and N.V. Philips, as a single enterprise, have committed various acts in violation of §2 of the Sherman Act.

Windmere also believes that it may prosecute Count II of Windmere's counterclaim entitled "Conspiracy to Restrain Trade." The Philips companies contend that because this claim was decided against Windmere by orders dated April 30 and June 8, 1987 and because these orders were not reversed on appeal, Windmere may not prosecute Count II of its counterclaim. This issue has been briefed to the Court.

Windmere also contends that it may prosecute a claim that N.A. Philips and N.V. Philips (a major stockholder) conspired to monopolize and maintain a monopoly in violation of §2 of the Sherman Act. The Philips companies contend that no such claim is pleaded in Windmere's Amended Counterclaim or Third Party Complaint, filed June 18, 1985. This issue was included in the "Wind-

mere Disputed Factual Issues" section of the prior Pretrial Stipulation and was briefed in the Federal Circuit. Also, Windmere contends that this issue was identified by Windmere in its January, 1986 responses to N.V. Philips' Interrogatories.

II. BASIS OF JURISDICTION

The Court has jurisdiction over the various claims under 15 U.S.C. §§ 1, 2, 4, 13, 15, 18, 26, 72, 1121 and 1125; 28 U.S.C. §§ 1331, 1332, 1337, 1338 and 2201; and 35 U.S.C. §§ 1 *et seq.*

III. PLEADINGS RAISING THE ISSUES

1. Amended Complaint for Patent Infringement and Unfair Competition, filed November 21, 1984.

2. Amended Answer, Counterclaim and Third Party Complaint of Defendant Windmere Corporation and Demand for Jury Trial on All Issues, filed June 18, 1985 (leave to file granted September 10, 1985).

3. Reply of U.S. Philips Corporation and North American Philips Corporation to Windmere's Amended Counterclaim, filed September 27, 1985.

4. Answer of N.V. Philips Gloeilampenfabrieken to Amended Third Party Complaint of Windmere Corporation, filed September 27, 1985.

IV. OUTSTANDING MOTIONS AND OTHER MATTERS REQUIRING THE COURT'S ATTENTION

1. The parties have a number of disputes regarding additional discovery which they hope to raise with the Court on January 19, 1990.

2. The Philips Companies' Motion To Hold Izumi In Contempt is outstanding.

3. U.S. Philips, N.A. Philips, and N.V. Philips ("Philips") have submitted a "Memorandum of Law Directed to Windmere's Purported Section 1 Claim." Windmere responded on December 15, 1989 and Philips' reply was filed on December 21, 1989.

4. To the extent that the objections to Windmere's antitrust exhibits made by U.S. Philips, N.A. Philips, and N.V. Philips differ from those set out in the Pretrial Stipulation filed with the Court in 1986, Windmere objects to those objections. Also, to the extent that the exhibit list of U.S. Philips, N.A. Philips, and N.V. Philips contains exhibits not contained in the 1986 Pretrial Stipulation, Windmere objects to those exhibits, although it reserves the right to waive these objections after it has had an opportunity to review those exhibits.*

V. STATEMENT OF STIPULATED FACTS

1. U.S. Philips is a Delaware corporation with its principal place of business in New York, New York.

2. N.A. Philips is a Delaware corporation with its principal place of business in New York, New York.

3. Windmere is a Florida corporation and has a regular and established place of business in Miami Lakes, Florida.

4. Izumi is a corporation organized and existing under the laws of Japan.

5. N.V. Philips is a corporation organized and existing under the laws of the Netherlands.

6. From 1984 to 1986 N.V. Philips owned approximately 60% of the shares of N.A. Philips. As of November 2, 1987, N.A. Philips became a wholly-owned, indirect subsidiary of N.V. Philips.

*See rider page 4-A inserted by Windmere.

7. N.A. Philips has sold two-headed rotary electric razors since 1948 and three-headed rotary electric razors since 1966 in interstate commerce in the United States under the Norelco trademark. These Norelco razors are manufactured in the Netherlands by N.V. Philips.

Windmere contends (1) that its exhibits and witnesses are the exhibits and witnesses listed in the 1986 Pretrial Stipulation except for certain substitutions, and (2) that Philips has added some post-1985 documents to its new exhibit list and some other matters to this Pretrial Stipulation not included in the 1986 Stipulation. Windmere objects to that practice because it contends that there was an agreement on limited new discovery. Philips disagrees with these contentions.

In addition, post-1985 discovery is contemplated by Philips through its memorandum served yesterday. If the Court permits the addition of substantial information relating to the years 1986-1988, Windmere identifies the additional exhibits listed in Schedule D.

8. The specific designs of N.A. Philips' three-headed rotary razor models have varied, one from another, with respect to individual design details.

9. Windmere's sales of its RR-1, RR-2, RR-3 and RR-4 razors are charged under N.A. Philips' unfair competition count. These Windmere shavers were manufactured by Izumi.

10. Izumi manufactured and sold to Windmere the following numbers of rotary electric razors:

<u>RR-1</u>	<u>RR-2</u>	<u>RR-3</u>	<u>RR-4</u>
132,000	219,960	54,972	59,982

Windmere sold, from June, 1984 to October 31, 1985, 94,503 RR-1 razors at an average sales price of \$31.18;

165,254 RR-2 razors at an average sales price of \$17.30; 42,040 RR-3 razors at an average sales price of \$25.17; and 32,879 RR-4 razors at an average sales price of \$16.89.

11. On June 10, 1986, U.S. Design Patent No. 284,224 (the '224 patent) issued to Izumi Seimitsu Kogyo Kabushiki Kaisha.

12. On September 20, 1988, U.S. Design Patent No. 297,772 (the '772 patent) issued to Izumi Seimitsu Kogyo Kabushiki Kaisha.

13. On July 18, 1967, U.S. Design Patent No. 208,142 (the '142 patent) issued to North American Philips Company, Inc.

14. On February 9, 1971, U.S. Design Patent No. 219,901 (the '901 patent) issued to U.S. Philips Corporation.

15. On December 12, 1972, U.S. Design Patent No. 225,487 (the '487 patent) issued to U.S. Philips Corporation.

16. On August 5, 1975, U.S. Design Patent No. 236,239 (the '239 patent) issued to U.S. Philips Corporation.

17. On August 5, 1975, U.S. Design Patent No. 236,240 (the '240 patent) issued to U.S. Philips Corporation.

18. On August 5, 1975, U.S. Design Patent No. 236,241 (the '241 patent) issued to U.S. Philips Corporation.

19. On October 21, 1975, U.S. Design Patent No. 237,320 (the '320 patent) issued to U.S. Philips Corporation.

20. On December 2, 1975, U.S. Design Patent No. 237,911 (the '911 patent) issued to U.S. Philips Corporation.

21. On December 2, 1975, U.S. Design Patent No. 237,913 (the '913 patent) issued to U.S. Philips Corporation.

22. On February 10, 1976, U.S. Design Patent No. 238,826 (the '826 patent) issued to U.S. Philips Corporation.

23. On March 9, 1976, U.S. Design Patent No. 239,144 (the '144 patent) issued to U.S. Philips Corporation.

24. On April 6, 1976, U.S. Design Patent No. 239,473 (the '473 patent) issued to U.S. Philips Corporation.

25. On September 14, 1976, U.S. Design Patent No. 241,482 (the '482 patent) issued to U.S. Philips Corporation.

26. On November 30, 1976, U.S. Design Patent No. 242,580 (the '580 patent) issued to U.S. Philips Corporation.

27. On March 15, 1977, U.S. Design Patent No. 243,719 (the '719 patent) issued to U.S. Philips Corporation.

28. On December 20, 1977, U.S. Design Patent No. 246,731 (the '731 patent) issued to U.S. Philips Corporation.

29. On June 16, 1981, U.S. Design Patent No. 259,591 (the '591 patent) issued to U.S. Philips Corporation.

30. On July 13, 1982, U.S. Design Patent No. 265,431 (the '431 patent) issued to U.S. Philips Corporation.

31. On July 21, 1981, U.S. Design Patent No. 259,965 (the '965 patent) issued to U.S. Philips Corporation.

32. On September 6, 1983, U.S. Design Patent No. 270,487 (the '487 patent) issued to U.S. Philips Corporation.

33. On March 11, 1986, U.S. Design Patent No. 282,979 (the '979 patent) issued to U.S. Philips Corporation.

34. On March 18, 1986, U.S. Design Patent No. 283,059 (the '059 patent) issued to U.S. Philips Corporation.

35. On September 16, 1986, U.S. Design Patent No. 285,731 (the '731 patent) issued to U.S. Philips Corporation.

36. On September 30, 1986, U.S. Design Patent No. 285,979 (the '979 patent) issued to U.S. Philips Corporation.

37. On October 7, 1986, U.S. Design Patent No. 286,089 (the '089 patent) issued to U.S. Philips Corporation.

38. On October 7, 1986, U.S. Design Patent No. 286,090 (the '090 patent) issued to U.S. Philips Corporation.

VI. STATEMENT OF FACTS, NOT ADMITTED, WHICH ARE NOT TO BE CONTESTED AT TRIAL

1. Personal jurisdiction over N.V. Philips.

2. Pursuant to the Court's December 15, 1989 Order, the Philips Companies were precluded from contending that the relevant geographic market included Western Europe, Japan and the United States. Thus, the relevant market for the purposes of Windmere's antitrust counterclaim shall be the United States.

VII. ISSUES OF FACT TO BE LITIGATED AT TRIAL

A. Unfair Competition Issues the Parties Agree Are To Be Litigated At Trial

1. If Windmere is found to have committed acts of unfair competition, whether N.A. Philips has been damaged by Windmere's sales of Ronson brand three-headed

rotary electric razors that are alleged to embody the "Norelco Design Look."

2. If Windmere is found to have committed acts of unfair competition, whether such acts were willful and deliberate.

**B. Unfair Competition Issues The Parties Disagree
As To Whether They Are To Be Litigated, Or As
To The Statement Of The Issue**

1. N.A. Philips contends there is an issue of whether the three-headed rotary electric razors having the "telephone hook" design marketed by Norelco since 1975 constitute a "family" of razors.

2. N.A. Philips contends there is an issue of whether the overall external appearance of Norelco's "telephone hook" family of razors has an overall design impression, trade dress or look referred to as the "Norelco Design Look." N.A. Philips contends that the statements numbered 1 and 2 above, in this subsection, more correctly state the issues to be tried than what Windmere proposes below in this paragraph. Windmere contends that the correct statement of issues one and two is whether rotary shavers marketed by Norelco have an overall outer design impression, look, or trade dress, referred to as the "Norelco design look." Windmere states further that NAPC agreed that this was an issue to be tried in the pretrial statement filed before the first trial.

3. N.A. Philips contends there is an issue of whether purchasers or likely purchasers of electric razors, otherwise known as "members of the purchasing public," associate razors which embody the primarily non-functional "Norelco Design Look" with N.A. Philips and/or Norelco. N.A. Philips contends that the statement

above, in this paragraph, more correctly states the issue to be tried than what Windmere proposes below in this paragraph. Windmere contends that there is an issue whether purchasers, and likely purchasers, of electric razors (the "purchasing public") associate razors having the Norelco design look with Norelco, N.A. Philips, and/or Philips because of non-functional aspects of the Norelco design look. Windmere states further that NAPC agreed that this was an issue to be tried in the original pretrial stipulation filed prior to the first trial.

4. N.A. Philips contends there is an issue of whether members of the purchasing public are likely to be confused, misled or deceived into believing that Windmere's Ronson brand three-headed rotary electric razors were made by, approved by, sponsored by or in some way associated with N.A. Philips or Norelco because of the alleged substantial similarities in appearance between these Ronson razors and Norelco's family of razors which embody the primarily non-functional "Norelco Design Look." N.A. Philips contends that the statement above, in this paragraph, more correctly states the issue to be tried than what Windmere proposes below in this paragraph. Windmere contends that there is an issue of whether members of the purchasing public are likely to be confused, misled or deceived into believing that each of the models of the Ronson rotary electric shavers were made by, approved by, sponsored by, and/or are in some manner associated with Norelco, N.A. Philips, and/or Philips as a result of substantial similarities in appearance between the Ronson rotary electric razor and the primarily non-functional aspects of the Norelco design look. Windmere states further that NAPC agreed that this was an issue to be tried in the pretrial stipulation filed prior to the first trial.

5. N.A. Philips contends there is an issue of whether members of the purchasing public have actually been confused by reason of the alleged substantial similarities between Ronson three-headed rotary electric razors and Norelco's family of razors which embody the primarily non-functional "Norelco Design Look." N.A. Philips contends that the statement above, in this paragraph, more correctly states the issue to be tried than what Windmere proposes below in this paragraph. Windmere contends that there is an issue whether members of the purchasing public have been "actually confused" by reason of the alleged similarity of the overall outer design appearance, look, or trade dress for the Ronson rotary razors with the alleged "Norelco design look." Windmere states further that NAPC agreed that this was an issue to be tried in the original pretrial stipulation filed prior to the first trial.

6. N.A. Philips contends there is an issue of whether Norelco rotary electric razors enjoy a reputation of high quality and performance with the purchasing public. Windmere disagrees that this is a proper issue.

7. N.A. Philips contends there is no longer an issue of whether the overall external appearance of the "Norelco Design Look," which emanates from the razors in Norelco's "telephone hook" family of razors, is primarily non-functional. Specifically, N.A. Philips contends that the issuance of U.S. Design Patent Nos. 284,224 and 297,772, which by definition cover ornamental and not functional designs, establishes that N.A. Philips' "telephone hook" design is primarily non-functional. Thus, N.A. Philips contends that Windmere is estopped from asserting that the overall appearance of the "telephone hook" design is primarily functional. N.A. Philips contends that any stipulation it made on this issue prior to

the first trial was made at a time before the aforementioned design patents were discovered by N.A. Philips and before the court ordered a new trial by reason of the failure to discover such design patents. Windmere contends that there is an issue of whether the alleged Norelco design look is primarily non-functional. Windmere states further that N.A. Philips agreed that this was an issue to be tried in the pretrial stipulation filed before the first trial. Windmere contends that the existence of the above-mentioned design patents in no way obviates the need to litigate the functionality of the alleged Norelco Design Look.

8. N.A. Philips contends that whether the Sears Rotomatic III embodies the so-called "NAPC Design Impression" is irrelevant to any issue in this litigation. In the pretrial stipulation filed before the first trial, NAPC agreed to the following as Stipulated Fact: "The Sears Rotomatic III does not embody the so-called 'Norelco Design Look.' " Windmere contends that NAPC should be bound by this stipulated fact and thus this proposed stipulated fact should be presented to the jury.

9. Windmere contends that there is an issue of whether N.A. Philips is precluded from relief because it is guilty of laches and estoppel arising from the timing of the commencement of the suit against Windmere. Windmere states further that NAPC agreed that this was an issue to be tried in the pretrial stipulation filed before the first trial. NAPC contends this is not an issue to be tried.

10. Windmere contends that there is an issue of whether N.A. Philips' claim for unfair competition based on the alleged "Norelco Design Look" is barred by misuse thereof. Windmere states further that NAPC agreed that this was an issue to be tried in the pretrial stipula-

tion filed before the first trial. NAPC contends this is not an issue to be tried.

11. Windmere contends that there is an issue of whether the various different models of the three-headed rotary electric shavers having a "telephone hook" shape that were and are marketed by Norelco embody a distinctive, definable, common appearance referred to as the alleged "Norelco Design Look." N.A. Philips contends that such issue has no proper legal foundation.

12. Windmere contends that there is an issue of whether this "telephone hook" shape for rotary shavers is an ordinary shape that has been generally used for three-headed rotary shavers. N.A. Philips contends that such issue has no proper legal foundation, but would agree to its inclusion as a fact to be tried if the words "ordinary shape" were changed to merely "shape," and if the nomenclature "Norelco Design Look" were used instead of "telephone hook shape."

13. Windmere contends that there is an issue of whether, even if N.A. Philips ever had proprietary rights in the "telephone hook" design for rotary shavers, it has abandoned its exclusivity in such rights. N.A. Philips contends that the issue of "abandonment" in the exclusivity of its rights to the Norelco Design Look is no longer at issue pursuant to the Court's ruling on March 12, 1986.

14. Windmere contends that there is an issue of whether N.A. Philips has acquiesced in the long and continuous use and marketing by Izumi and Sears of three-headed rotary shavers with a "telephone hook" shape in the United States. N.A. Philips contends that the issue of any acquiescence in the use and sale of Izumi-made shavers by Sears is no longer at issue pursuant to the Court's ruling on March 12, 1986.

15. Windmere contends that there is an issue of whether the alleged "Norelco Design Look" has been abandoned by acquiescence to the marketing by others of rotary electric shavers having a similar design appearance. N.A. Philips contends that the issue of "abandonment by acquiescence" in the marketing of razors by "others," the only other being identified being Sears, is no longer at issue pursuant to the Court's ruling on March 12, 1986.

16. Windmere contends that there is an issue as to whether or not the alleged "Norelco Design Look" identifies the product itself rather than its source, and is therefore generic. N.A. Philips contends there is no proper legal foundation for this issue, but would agree to its inclusion if the words "rather than its source" were changed to "and not its source" and the words "and is therefore generic" were deleted.

17. Windmere contends that there is an issue of whether purchasers, and likely purchasers, of electric razors (the "purchasing public") associate rotary electric razors that do not have the alleged "Norelco Design Look" with Norelco, N.A. Philips and/or Philips. N.A. Philips contends that there is no proper legal foundation for considering any alleged confusion as to razors *not* accused in this litigation.

18. Windmere contends that there is an issue of whether N.A. Philips has acted improperly in its dealings with the U.S. Patent & Trademark Office in connection with its two trademark applications in attempting to obtain trademark registration for a triangular shaped faceplate for a three-headed rotary shaver. N.A. Philips contends that there is no proper legal foundation for considering trademark rights not asserted in this litigation.

19. N.A. Philips contends that there is an issue of whether U.S. Design Patent No. 284,224 (the '224 patent) claims an "ornamental design." Windmere contends that such issue has no proper legal foundation.

20. N.A. Philips contends that there is an issue of whether U.S. Design Patent No. 297,772 (the '772 patent) claims an "ornamental design." Windmere contends that such issue has no proper legal foundation.

21. Windmere contends that there are issues of whether U.S. Design Patent Nos. 236,239 (the '239 patent), 237,320 (the '320 patent), 237,911 (the '911 patent), 237,913 (the '913 patent), 246,731 (the '731 patent), 270,487 (the '487 patent), and 286,090 (the '090 patent) embody the alleged "Norelco Design Look." N.A. Philips contends that such issues have no proper legal foundation.

22. N.A. Philips contends that Mr. Shunji Izumi signed both the application which resulted in the issuance of the '224 patent and the application which resulted in the issuance of the '772 patent. Windmere contends that whether Mr. Izumi signed such patent application is irrelevant to any issue in this litigation.

C. Antitrust Issues the Parties Agree Are to be Litigated at Trial

1. Whether electric razors, rotary electric razors and alleged submarkets purportedly based on price are relevant markets. The following factors are factual issues that may be considered:

- a. reasonable interchangeability
- b. cross-elasticity of supply and demand
- c. industry or public recognition
- d. peculiar characteristics and uses

- e. unique production facilities
- f. distinct customers
- g. distinct prices
- h. sensitivity to price changes
- i. specialized vendors
- j. entry conditions

2. What is N.A. Philips' share of the relevant market or submarkets, if any.

3. For the relevant period, what has been the level of profits in the relevant market or submarkets for the counterclaim defendants.

4. Have counterclaim defendants controlled prices or excluded existing competition or prospective competition in such relevant market or submarkets, if any. Counterclaim defendants contend that the exclusion, if any, must be unreasonable.

5. Was there a dangerous probability of success that counterclaim defendants would be successful in an attempt to monopolize, if any.

6. Whether counterclaim defendants had any specific intent to attempt to monopolize.

7. Why the television networks discontinued the Ronson ad.

8. Was Windmere injured, in whole or in part, by any antitrust violation by counterclaim defendants and, if so, the amount of such damage.

9. The marketing of electric and/or rotary shavers in the United States.

D. Antitrust Issues Upon Which the Parties Disagree

Windmere Disputed Factual Issues

1. Are N.A. Philips and N.V. Philips a single entity or independent entities for the purposes of analysis under the Sherman Act.

2. Has N.A. Philips agreed with N.V. Philips to use various practices to maintain a monopoly, to foreclose competition, or to destroy a competitor.

3. Whether N.A. Philips or N.V. Philips, acting independently or by agreement, have sold models HP 1320 and 1615 or Norelco's entire razor line below an appropriate cost, with intent to maintain a monopoly by eliminating all competition.

4. Whether the market position, market power or monopoly power of N.A. Philips and/or N.V. Philips was intentionally maintained by various acts, including (a) acquisitions, (b) sham litigation, (c) advertising expenditures, (d) reducing prices on products, thereby preventing entry and operating at a loss to remove competition, (e) agreeing to subsidize losses with the intent to remove competition and maintain a monopoly and (f) controlling and agreeing on prices of products to be sold in the United States, thereby foreclosing competition, gaining a competitive advantage or destroying a competitor.

5. During 1984 and 1985, did N.A. Philips and/or N.V. Philips have monopoly power in the relevant market.

6. During the relevant time period, did N.A. Philips or N.V. Philips, acting independently or by agreement, sell products at unreasonably low prices, thereby sacrificing short-run profits in an industry where entry would not likely occur.

N.A. Philips and N.V. Philips Disputed Factual Issues

1. Did N.A. Philips acquire or obtain market power or monopoly power by means other than superior skill, foresight and industry; if so, has N.A. Philips:

- a. Sold models HP 1320 and 1615 or Norelco's entire razor line below average variable cost;
- b. Filed sham litigation;
- c. Excessively advertised for the purpose of foreclosing competition;
- d. Improperly challenged Windmere's network advertising using bribery or coercion;
- e. Made improper acquisitions.

VIII. ISSUES OF LAW

A. Unfair Competition Issues

1. Whether the alleged "Norelco Design Look" is entitled to protection under 15 U.S.C. Section 1125(a).

2. Whether Windmere has committed acts of unfair competition by selling Ronson brand rotary electric razors (i.e., RR-1, RR-2, RR-3 and RR-4) which are alleged to embody the "Norelco Design Look" if such Design Look is entitled to protection under the Lanham Act.

3. Whether N.A. Philips is entitled to increased damages and/or, if this is an exceptional case, its attorney's fees under 15 U.S.C. § 1117.

4. Whether N.A. Philips has misused any alleged rights it may have in the Norelco Design Look, rendering any such rights unenforceable.

5. If this is an exceptional case, whether Windmere is entitled to its attorney's fees under 15 U.S.C. § 1117.

B. Antitrust Issues

1. Whether Windmere has proven the elements of a monopolization violation under §2 of the Sherman Act: (1) the possession of monopoly power in a relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

2. Whether Windmere has proven the elements of an attempt to monopolize violation under §2 of the Sherman Act: (1) specific intent to monopolize; (2) a dangerous probability of success; (3) in a defined relevant market.

3. Whether Windmere suffered any damages by reason of any antitrust violation by counterclaim defendants, and the amount of any such damages.

Windmere Issues

1. Whether Windmere has proven the elements of a violation under §1 of the Sherman Act: (1) the existence of a conspiracy among two or more separate entities (2) in an unreasonable restraint of trade or commerce in a relevant market. If such a claim remains viable, N.A. Philips and N.V. Philips contend that there is a third requirement that Windmere also must prove a significant anticompetitive effect on interstate commerce.

2. Whether Windmere has alleged and proven the elements of a conspiracy to monopolize violation under §2 of the Sherman Act: (1) the existence of a conspiracy to unlawfully monopolize and (2) an overt act in furtherance of that conspiracy. If such a claim is viable, N.A. Philips and N.V. Philips contend that there is a third requirement that Windmere also must prove a specific intent to monopolize.

IX. LIST OF TRIAL EXHIBITS

Unfair Competition

The unfair competition exhibit list for N.A. Philips is attached as Schedule A and Windmere's unfair competition exhibit list is attached as Schedule C. Windmere and N.A. Philips reassert their objections to the exhibits listed on the original exhibit lists. N.A. Philips' most recent exhibit list adds many new exhibits. Windmere objects to these new exhibits to the extent that they are not related to the "design patent" issues. N.A. Philips reserves the right to add additional exhibits for purposes of impeachment and/or rebuttal, for demonstrative purposes, by reason of the planned addition of new expert witnesses of defendants, and by reason of the recently-discovered re-introduction of Windmere and/or Ronson rotary three-headed razors for sale in the United States. Exhibits marked with an * on Windmere's Exhibit List are those which Windmere currently expects to introduce into evidence at trial. Windmere, however, reserves the right to introduce into evidence any other listed exhibits, and reserves the right to introduce additional impeachment or rebuttal exhibits. Both parties reserve the right to introduce exhibits listed on the Exhibit Lists provided as part of the antitrust case.

Antitrust

The antitrust exhibit list for U.S. Philips/N.A. Philips/N.V. Philips is attached as Schedule B. The list of Windmere/Izumi antitrust exhibits is attached as Schedule D.

X. LIST OF WITNESSES

Witness lists for U.S. Philips/N.A. Philips/N.V. Philips and Windmere are attached as Schedules E and F respectively.

XI. ESTIMATE OF TRIAL TIME

The parties estimate that the trial will take approximately three to four weeks.

XII. ATTORNEYS' FEES

The Court may in its discretion award attorneys' fees to the prevailing party in a Section 1125(a) unfair competition proceeding. 15 U.S.C. §1117.

The best estimates of U.S. Philips and N.A. Philips of their recoverable attorneys' fees under these provisions is \$1,200,000 through and including trial, unless the Court also determines that U.S. Philips and N.A. Philips may also recover the attorney's fees spent in defending the counterclaim, which would add \$2,000,000 to the estimate.

The best estimate of Windmere of its recoverable attorney's fees under 15 U.S.C. §1117 is \$1,250,000 through and including the trial. In addition, if defendant Windmere prevails on any antitrust claim, it is entitled to reasonable attorney's fees under 15 U.S.C. §§15 and 72.

[Discrepancy in original document]

counterclaims is presently estimated at \$1.5 million through and including the upcoming trial.

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N.A. Philips and N.V. Philips

**APPENDIX H – RESPONSE OF IZUMI TO N.A.
PHILIPS' INTERROGATORIES, FILED IN THE
SOUTHERN DISTRICT OF FLORIDA,
DATED FEBRUARY 12, 1990**

[Caption Omitted in Printing]

**RESPONSE OF IZUMI TO
N.A. PHILIPS' INTERROGATORIES**

Pursuant to Federal Rules of Civil Procedure 33, Izumi Seimutsu Kogyo Kabushika Kaisha ("Izumi") hereby responds to N.A. Philips' Interrogatories served on February 2, 1990.

GENERAL OBJECTIONS

1. Izumi objects to these interrogatories on the grounds that it seeks information beyond that permitted by the Court at the January 31, 1990 Status Hearing. In particular, Izumi objects to these interrogatories to the extent that it seeks information beyond the identity of the person(s) at Izumi most knowledgeable about the facts surrounding the use of the Windmere name on the rotary shavers sold to Dayton-Hudson/Target. Moreover, Izumi is not a party to the unfair competition claim pending before the Court, and thus, has no obligation to provide responses to these interrogatories. Notwithstanding these objections, and without waiver thereof, Izumi is willing to provide responses to these interrogatories (unless otherwise objected to) to the extent that responsive information is reasonably available and not unduly burdensome or oppressive.

2. Izumi objects to the extent that these interrogatories seek information protected by the attorney-client and/or work product privileges.

3. Izumi objects to the definition of defendant because Izumi is not a defendant in the unfair competition claim brought by N.A. Philips.

4. Izumi objects to the definitional section of N.A. Philips' interrogatories on the grounds that the definitions are overly broad, oppressive and burdensome and outside the scope of Fed. R. Civ. P. 34. Notwithstanding these objections, Izumi is willing to provide information (unless otherwise objected to) which is reasonably available.

5. Izumi objects on the grounds that the information sought is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence, or that its relevance is so tangential that it would be unduly burdensome and oppressive to respond to those interrogatories.

RESPONSES

INTERROGATORY NO. 1

(a) State when the negotiations between Dayton-Hudson/Target and Izumi culminating in the sale of three-headed rotary electric razors bearing the Windmere brand name by Izumi to Dayton-Hudson/Target began and ended, and identify the person(s) at Izumi most knowledgeable about the facts surrounding the negotiations culminating in the sale;

(b) State the quantity of three-headed rotary electric razors bearing the Windmere brand name sold by Izumi to Dayton-Hudson/Target;

(c) Identify the brand names, other than the Windmere name, that Izumi and Dayton-Hudson/Target considered or evaluated before deciding to market the Izumi-made rotary razors under the Windmere brand name;

(d) Identify the person(s) at Izumi and Windmere who participated in discussions or negotiations regarding use of the Windmere brand name;

(e) State the type, both monetary and non-monetary, and amount, of consideration given by Izumi to Windmere for the right to use the Windmere brand name; and

(f) To the extent not identified in parts (a) through (e) above, identify the person(s) most knowledgeable about the information in each of parts (a) through (e), identify all documents and things that refer or relate to the response to parts (a) through (e), and identify all persons having custody of documents and things that refer to the response to parts (a) through (e).

RESPONSE

(a) See general objections above. Notwithstanding these objections and without waiver thereof, Izumi states as follows: Despite Philips' continuing efforts to monopolize the relevant markets, and to prevent Izumi from selling its rotary shavers, Izumi first learned of a possible and limited sale of rotary shavers to Target in or about early to mid 1989. The sale to Target culminated in the fall of 1989. The person at Izumi most knowledgeable about the facts surrounding the Target sale is Shunji Izumi.

(b) See general objections above. Notwithstanding these objections and without waiver thereof, Izumi states as follows: 19,992.

(c) See general objections above. Notwithstanding these objections and without waiver thereof, Izumi has no information as to any other brand names which might have been considered.

(d) See general objections above. Notwithstanding these objections and without waiver thereof, Shunji Izumi

is the person at Izumi with most knowledge about the decision to use the Windmere name.

(e) See general objections above. Izumi further objects to the term "non-monetary" consideration on the grounds that it is indefinite, vague and ambiguous. Notwithstanding these objections, and without waiver thereof, and to the extent that Izumi understands the term "non-monetary," Izumi paid no compensation to Windmere.

(f) See general objections above. Izumi further objects on the grounds that the term "refer or relate" is overly broad, vague, indefinite and it would be unduly burdensome to identify all such documents. Nonetheless, Izumi identifies monthly shipping records (which are attached), which show the number of rotary shavers sold to Target (as well as other rotary shavers sold to Windmere). The person having custody of Izumi documents is Katsuya Asawa.

INTERROGATORY NO. 2

(a) State the quantity of Ronson brand rotary electric razors, by model number, sold by Izumi to Windmere to and through February 2, 1990 to the extent the quantities stated in the pretrial stipulation filed on January 18, 1990 are incomplete.

(b) State the date on which Izumi began selling Ronson brand rotary electric razors in clam packages;

(c) Identify the person(s) responsible for the decision to begin packaging Ronson brand rotary electric razors in clam packaging;

(d) State the quantity of Ronson brand rotary electric razors, by model number, sold by Izumi in clam packaging;

(e) Identify the differences in design, construction, and appearance between the Ronson brand RR-1 and RR-1C/225 rotary electric razors; identify the differences in design, construction, and appearance between the RR-3 and RR3CP/227 rotary electric razor; and

(f) To the extent not identified in parts (a) through (e) above, identify the person(s) most knowledgeable about the information in each of parts (a) through (e), identify all documents and things that refer or relate to the response to parts (a) through (e), and identify all persons having custody of documents and things that refer or relate to the response to parts (a) through (e).

RESPONSE

(a) See general objections. Notwithstanding these objections and without waiver thereof, pursuant to Federal Rule Civil Procedure 33(c), see attached monthly shipping records.

(b) See general objections. Notwithstanding these objections and without waiver thereof, Izumi states that despite Philips' continuing efforts to monopolize the relevant markets, and to prevent Izumi from selling its rotary shavers, Izumi first sold Ronson rotary shavers in clam packaging in or about April 1989.

(c) See general objections. Notwithstanding these objections and without waiver thereof, Izumi has no knowledge as to the identity of any such person.

(d) See general objections. Notwithstanding these objections and without waiver thereof, pursuant to Federal Rules Civil Procedure 33(c), see attached documents.

(e) See general objections. Izumi further objects to the terms "design, construction and appearance" on the

grounds that these terms are overly broad, vague and ambiguous. Notwithstanding these objections and without waiver thereof, counsel for N.A. Philips has previously been informed and has acknowledged that there are no differences in design, construction and appearance between the razors identified in this interrogatory.

(f) See general objections above. Izumi further objects on the grounds that the term "refer or relate" is indefinite, vague, overly broad and it would be unduly burdensome to identify all such documents. Nonetheless, documents identified above are responsive to this request. The person at Izumi with most knowledge about the information in this interrogatory is Shunji Izumi. The person having custody of the documents identified herein is Katsuya Asawa.

Dated: February 12, 1990

Respectfully submitted,
AS TO THE OBJECTIONS

DICKSTEIN, SHAPIRO & MORIN

By: /s/ Charles W. Saber
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DECLARATION

I declare under penalty of perjury under the laws of the United States of America that the foregoing answers to interrogatories are true and correct to the extent based upon personal knowledge, and are believed to be true and correct to the extent based upon information and belief.

Executed on February 8, 1990

/s/ Shunji Izumi
Shunji Izumi
President, Izumi Seimitsu
Kogyo Kabushika Kaisha

Rotary Shaver monthly shipping record

MODEL MONTH	RR-1	RR-2	RR-3	RR-4	REMARKS
1986 JAN.			9.996		Box 6.5
1986 FEB.			9.996		" "
1986 MAR.			9.996	9.996	" "
1986 APR.					
1986 MAY			9.996	19.992	" "
1986 JUN.					
1986 JUL.					
1986 AUG.					
1986 SEP.					
1986 OCT.					
1986 NOV.					
1986 DEC.					
TOTAL	0	0	39.984	29.988	

G. B. • GIFT BOX

Rotary Shaver monthly Shipping record

MODEL MONTH	RR-1	RR-2	RR-3	RR-4	REMARKS
1987 JAN.					
1987 FEB.					
1987 MAR.					
1987 APR.					
1987 MAY					
1987 JUN.					
1987 JUL.					
1987 AUG.					
1987 SEP.	4.996		10.008		ROCKSON G.B.
1987 OCT.					
1987 NOV.					
1987 DEC.	5.106				ROCKSON G.B.
TOTAL	10.002	0	10.008	0	

G.B = GIFT BOX

Rotary Shaver monthly Shipping record

MODEL MONTH	RR-1	RR-2	RR-3	RR-4	REMARKS
1988 JAN.	30				ROCKSON G.B.
1988 FEB.					
1988 MAR.	5.016		5.016		
1988 APR.	5.016				
1988 MAY	10.008				
1988 JUN.					
1988 JUL.					
1988 AUG.					
1988 SEP.					
1988 OCT.					
1988 NOV.			9.006		
1988 DEC.			1.002		
TOTAL	20.070		15.024		

G.B = GIFT BOX

MODEL MONTH	RR-1	RR-2	RR-3	RR-4	REMARKS
1989 JAN.					
1989 FEB.					
1989 MAR.					
1989 APR.	C.P. 5.016			C.P. 5.016	RAISON
1989 MAY				C.P. 5.016	
1989 JUN.			9.8 10.008		
1989 JUL.	C.P. 5.016		C.P. 10.008		
1989 AUG.	C.P. 5.016		15.238	(C.P. 10.008) (C.B. 5.228)	
1989 SEP.		TARGET 9.000	C.B. 3.636		
1989 OCT.		TARGET 10.992	C.P. 5.016		
1989 NOV.					
1989 DEC.					
TOTAL	15.048	19.992	43.896	10.032	

G.B. = GIFT BOX

C.P. = CLAM PACK

[Certificate of Service Omitted in Printing]

APPENDIX I – REQUEST FOR JUDICIAL NOTICE IN THE SOUTHERN DISTRICT OF FLORIDA

APRIL 4, 1990

[Caption Omitted in Printing]

REQUEST FOR JUDICIAL NOTICE

Plaintiff, North American Philips Corporation ("NAPC"), hereby requests this Court, pursuant to Rule 201(d), to take judicial notice of the fact that NAPC has filed a claim in the U.S. District Court for the Northern District of Illinois objecting to the sale by Sears, Roebuck & Co. of rotary electric shavers that allegedly embody the NAPC Design Impression, and asking that Court to halt all further such sales. 201(d), Fed. R. Evid., which states:

A court shall take judicial notice if requested by a party and supplied with the necessary information.

This motion is further based on the refusal of the Court to permit inquiry during the evidentiary portion of the trial of the actions taken by N.V. Philips and NAPC to halt the importation by Sears and the sale by Sears of various rotary electric shavers. The plaintiff seeks only to have this Court advise the jury of the following statement:

Ladies and gentlemen of the jury, you have heard evidence in this case pertaining to various rotary electric shavers sold by Sears. You are advised, and must accept as conclusive, that NAPC has filed an action in the U.S. District Court for the Northern District of Illinois objecting to the sale of rotary razors by Sears that allegedly incorporate the NAPC Design Impression, and asking that Court to halt any further sales. That action is still pending.

Such a statement by the Court would not lead to any prejudice or undue emphasis being placed on other litigation.

It would result in no undue prejudice to the defendant, Windmere, which itself, over objection, introduced the evidence pertaining to Sears shavers. Moreover, by this Court advising the jury of the fact as a judicially noticed fact, there will be no prejudicial impact through the use of such information in questioning of witnesses, which could have resulted in the undue emphasis and prejudice considered during the trial by the Court.

This Court has observed that, if anything is clear, Philips has been vigilant in protecting its rights and objecting to the use by others of its design impression.¹ While this may be clear to the Court, there is no evidentiary basis for the jury to so conclude, and the failure to permit inquiry into this area has resulted in extreme prejudice to NAPC. Further, if the Court is correct that the jury believes NAPC has been vigilant, no possible harm can come from the request for judicial notice. If the Court is incorrect as to what is in the minds of the jury, failure to take judicial notice of the action in Sears and give the requested statement to the jury will compound and strengthen the prejudice to NAPC.

Attached hereto is a certified copy of the Supplemental Third Party Defendant Counterclaims, filed in the U.S. District Court for the Northern District of Illinois, attesting to and evidencing the facts as to which this Court is requested to take judicial notice.

¹ At Volume 7, page 1236, the Court observed:

I think if there is one thing that has become clear in this trial is that Philips has vigorously sought to protect its perceived rights, intellectual property rights here, in a variety of fore and in a variety of locations, including the United States, Japan and elsewhere, but I'm at a loss to see what relevance it is to bring out that Philips sued Izumi in Japan beyond having already permitted that question to be asked of Izumi in cross-examination.

Respectfully submitted,

/s/ Mark T. Banner

Mark T. Banner

Christopher J. Renk

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Date: April 3, 1990

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CERTIFIED COPY (Rev. 6/85)

UNITED STATES DISTRICT COURT

Northern District of Illinois
Eastern Division

I, H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois, do hereby attest and certify that the annexed document is a full, true, and correct copy of the original(s) on file in my office and in my legal custody.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois on 3-28-90.

/s/ H. Stuart Cunningham
CLERK

By/s/Illegible
Clerk

[SEAL]

[Caption Omitted in Printing]

SUPPLEMENTAL THIRD PARTY
DEFENDANT COUNTERCLAIMS

FOR ITS COUNTERCLAIMS FOR UNFAIR COMPETITION AGAINST SEARS ROEBUCK & CO., THIRD PARTY DEFENDANT, NORTH AMERICAN PHILIPS CORPORATION, ALLEGES AS FOLLOWS:

1. Third Party Defendant, NORTH AMERICAN PHILIPS CORPORATION ("NAPC"), is a corporation incorporated under the laws of the State of Delaware and has a place of business at 100 East 42nd Street, New York, New York 10017.

2. Defendant, SEARS ROEBUCK & CO. ("Sears"), is a corporation incorporated under the laws of the State of New York and has a regular and established place of business in this district at Sears Tower, Chicago, Illinois 60684.

3. Defendant and Counterplaintiff, IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA ("Izumi"), is a corporation incorporated under the laws of Japan and has a place of business in New York, New York and at 3-1 Moto-machi 2-Chome, Matsumoto City, Nagano Prefecture 390, Japan.

4. The Court has subject matter jurisdiction with respect to the unfair competition counterclaims under 15 U.S.C. §§1121 and 1125, and 28 U.S.C. §1338. Additionally, there is diversity of citizenship and the amount in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars. Venue is proper under 28 U.S.C. §1391.

5. The claims herein arise as a result of recent introduction and sales of two models of men's three-headed

rotary electric shavers, models 86840 and 86841 (the "Sears Rotary Shavers"), which are manufactured in Japan by Izumi and which are then shipped to the United States and are sold in the United States, including in this district, by Sears. The overall exterior appearance or visual design impression of these Sears Rotary Shavers is strikingly similar to the basic visual design impression embodied in the family of NAPC's men's three-headed electric shavers long sold by NAPC. This similarity of design impression enables Sears to trade upon NAPC's deserved reputation with the purchasing public for three-headed rotary shavers of high quality and performance in the marketing of these shavers in the United States. Sears is thereby able to misappropriate to its own benefit NAPC's good will and favorable public acceptance symbolized by the basic design impression embodied in NAPC's family of three-headed rotary shavers.

6. For more than thirty-five years, NAPC has sold high quality, high performance men's electric rotary shavers under the NORELCO trademark to the retail trade in the United States. NAPC has extensively advertised and promoted its NORELCO rotary shavers. Those Norelco shavers have long been the largest selling brand of electric shavers in the United States.

7. NAPC commenced selling rotary shavers in the United States in the late 1940's when it introduced its first one-headed rotary shaver. Beginning in the early 1950's, improved two headed rotary shavers were first sold by NAPC. In the mid 1960's, NAPC introduced improved three-headed rotary shavers. Since then, NAPC has sold far more three-headed rotary shavers than one-headed and two-headed rotary shavers.

8. From time to time since the mid 1960's, NAPC has introduced improved models of its three-headed rotary shavers. Each has had a commercially attractive, overall design. The three-headed rotary shavers of the NAPC design family have shared the same distinctive overall visual impression. The designs embodied in the current NAPC three-headed rotary shaver models are exemplified by United States Design Patent No. D270,487.

9. For many years, Sears has marketed a variety of other personal hair care appliances, including rotary shavers, to the retail trade in the United States under the SEARS mark, and in recent years, under other marks including the NORELCO mark.

First Counterclaim for Unfair Competition:

10. NAPC realleges and incorporates herein by reference paragraphs Nos. 1-9 herein.

11. While the specific design impressions of NAPC's three-headed rotary shaver models have varied, one from another, in particular individual design details, most have shared a unique, distinctive, basic visual design impression (the "NAPC Design Impression"). These are readily recognizable by the purchasing public as members of a single family of closely related rotary shavers.

12. NAPC three-headed rotary shavers have long enjoyed a reputation for highest quality and performance with the purchasing public. This deserved reputation is an asset and property right of great value to NAPC. By reason, *inter alia*, of the national advertising and promotion of NAPC three-headed rotary shavers, and the large volume of such rotary shavers sold over the years, the purchasing public has come to associate this reputation for high quality and performance with the NAPC Design

Impression long exclusively embodied in NAPC three-headed rotary shavers.

13. The Sears Rotary Shavers misappropriate the NAPC Design Impression, and consequently trade upon the public's association of the NAPC Design Impression with NAPC's reputation for quality and performance. Such misappropriation has and will improperly facilitate the sale of the Sears Rotary Shavers.

14. NAPC has been and will be damaged, by Sears' and Izumi's copying of the NAPC Design Impression. NAPC's valuable reputation for high quality and performance is and will be wholly at risk in the hands of Sears' and Izumi's quality control and product performance. Upon information and belief, the Sears Rotary Shavers are inferior to NAPC's three-headed shavers in both quality and performance.

15. Unless enjoined, NAPC's damage will be irreparable.

Second Counterclaim for Unfair Competition:

16. NAPC realleges and incorporates herein by reference hereto paragraphs Nos. 1-9, 11, 12 and 15 herein.

17. By reason, *inter alia*, of the national advertising and promotion of NAPC three-headed rotary shavers, and the great number of such shavers sold over the years, the purchasing public has come to identify NAPC's three-headed rotary shavers by the NAPC Design Impression and to use the NAPC Design Impression to distinguish NAPC's three-headed rotary shavers from other three-headed rotary shavers. Consequently, the NAPC Design Impression, which is non-functional, has developed a trademark significance and is a valuable property right of NAPC.

18. The embodiment of the NAPC Design Impression in the Sears Rotary Shavers unfairly trades upon the good will and favorable public acceptance and recognition of the NAPC Design Impression. As a result of the advertising and sale of such Sears Rotary Shavers, there is a likelihood that the purchasing public will be confused, deceived or will mistakenly believe that NAPC made the Sears Rotary Shavers for private label sales by Sears, that NAPC sponsors or approves of the Sears Rotary Shavers, and/or that NAPC is in some way associated with the making of the Sears Rotary Shavers.

19. NAPC's rights in its NAPC Design Impression trademark have been and will continue to be damaged by sales of Sears Rotary Shavers which, upon information and belief, are of quality inferior to that of NAPC three-headed rotary shavers and do not perform as well as NAPC three-headed rotary shavers.

20. Sears has intentionally and willfully, and in reckless disregard to NAPC's rights, commenced the sale of the Sears Rotary Shavers knowing that NAPC previously had instituted a lawsuit for unfair competition against Windmere Corporation in the United States District Court for the Southern District of Florida, Civil Action No. 84-2508-Civ-Marcus, because of the sale by Windmere Corporation of rotary shavers which have a virtually identical design impression to that of the Sears Rotary Shavers and which were also made by Izumi.

WHEREFORE, NAPC requests an Order of this Court against Sears as follows:

A. Permanently enjoining Sears, its officers, directors, employees, agents and all those under its direction and control, from manufacturing, selling and advertising to sell the Sears Rotary Shavers;

B. Awarding NAPC its damages, including Sears' profits, resulting from the sale of the Sears Rotary Shavers;

C. Awarding NAPC punitive damages; and

D. Awarding NAPC its reasonable attorneys' fees and costs herein pursuant to 15 U.S.C. §1117; and

E. Ordering the destruction of all Sears Rotary Shavers, and all packaging and advertising materials relating to and/or showing such rotary shavers; and

F. Ordering such other and further relief as the Court may deem just and proper.

/s/ Anne M. Rosenblum
D. Dennis Allegretti
John J. Held, Jr.
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[Certificate of Service Omitted in Printing]

**APPENDIX J – SPECIAL INTERROGATORIES
UNFAIR COMPETITION, FILED IN THE DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
FLORIDA, DATED APRIL 6, 1990**

[Caption Omitted in Printing]

**SPECIAL INTERROGATORIES
UNFAIR COMPETITION**

UNFAIR COMPETITION

1. Do you find that North American Philips has proved, by a preponderance of the evidence, that the trade dress of the Ronson razors so resembles the trade dress of Norelco as to be likely to cause purchasers or potential purchasers of electric razors to believe that the Ronson razors were made by, approved by, sponsored by, or were in some way associated with Norelco?

YES _____ NO ✓

2. Do you find that North American Philips has proved, by a preponderance of the evidence that the Norelco trade dress is "primarily non-functional"?

YES _____ NO ✓

3. Has North American Philips established by a preponderance of the evidence secondary meaning in the primarily non-functional features of Norelco trade dress used for its rotary shavers?

YES _____ NO ✓

4. If you answered "YES" to questions 1, 2 and 3, then state the amount of money, if any, to which North American Philips is entitled for unfair competition.

\$ _____

SO SAY WE ALL.

DATE: April 6, 1990 _____

/s/ Illegible
FOREPERSON

**APPENDIX K – SPECIAL INTERROGATORIES
ANTITRUST, FILED IN THE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA,
DATED APRIL 6, 1990**

[Caption Omitted in Printing]

**SPECIAL INTERROGATORIES
ANTITRUST**

INTERROGATORY NO. 1: MONOPOLIZATION

(a) Do you find from a preponderance of the evidence that, during the relevant time period, rotary shavers constituted a relevant product market?

YES ☒ NO ☐

If you have answered (a) above "YES," then answer (b); otherwise, do not answer (b), (c), or (d).

(b) Do you find from a preponderance of the evidence that, during the relevant time period, the counterdefendants N.A. Philips and N.V. Philips possessed monopoly power in the rotary shaver market?

YES ☒ NO ☐

If you have answered (b) above "YES," then answer (c); otherwise, do not answer (c) or (d).

(c) Do you find from a preponderance of the evidence that the counterdefendants willfully acquired or maintained monopoly power through one or more of the following acts of restrictive or exclusionary conduct:

(i) Reduced or established prices on the 1320 and 1615 model shavers which caused these products to be sold below average total cost?

YES ☒ NO ☐

(ii) Do you find from a preponderance of the evidence each of the following: (1) there are substantial barriers to entry into the rotary shaver market; (2) that Philips had 90% or more of the rotary shaver market; (3) that N.A. and N.V. Philips drastically slashed its prices in response to Windmere; (4) that the effect of that price slashing was to eliminate Windmere; (5) that the price of these products was materially raised thereafter; and (6) that the acts of Philips were willful.

YES ☒ NO ☐

If you have answered "YES" to either (c)(i) or (c)(ii) above, then answer (d); otherwise, do not answer (d).

(d) Do you find from preponderance of the evidence that such violation by the counterdefendants caused anti-trust injury to the business or property of Windmere?

YES ☒ NO ☐

**INTERROGATORY NO. 2: ATTEMPT
TO MONOPOLIZE**

(a) Do you find from a preponderance of the evidence that either rotary razors or rotary razors and foil razors sold below \$40 constitute a relevant market?

NEITHER ☒ ROTARY RAZORS ☐
ROTARY AND FOIL RAZORS UNDER \$40 ☐

If you answered either "ROTARY RAZORS" or "ROTARY AND FOIL RAZORS UNDER \$40" proceed to question (b). If you answered "NEITHER" proceed to INTERROGATORY NO. 3.

(b) Do you find from a preponderance of the evidence, that during the relevant time period, counterdefendants N.A. Philips and N.V. Philips attempted to monopolize a relevant market in violation of Section 2 of the Sherman

Act by pricing models 1320 and 1615 below average total cost as defined?

YES _____ NO _____

If you have answered (b) above "YES," then answer (c); otherwise, do not answer (c).

(c) Do you find from a preponderance of the evidence that the counterdefendants had the specific intent to acquire monopoly power?

YES _____ NO _____

If you have answered (c) above "YES," then answer (d); otherwise, do not answer (d).

(d) Was there a dangerous probability that the counterdefendants would succeed in their attempt to acquire monopoly power?

YES _____ NO _____

If you have answered (d) above "YES," then answer (e); otherwise, do not answer (e).

(e) Do you find from a preponderance of the evidence that such a violation by the counterdefendants caused antitrust injury to the business or property of Windmere?

YES _____ NO _____

INTERROGATORY NO. 3: CONSPIRACY TO MONOPOLIZE

(a) Do you find from a preponderance of the evidence that during the relevant time period, the counterdefendants N.A. Philips and N.V. Philips were separate economic entities that (1) combined or conspired to monopolize their relevant market (2) took an overt act in furtherance of that conspiracy and (3) had the specific intent

to monopolize in violation of Section 2 of the Sherman Act?

YES ✓ NO _____

If you have answered (a) above "YES," then answer (b); otherwise, do not answer (b).

(b) Do you find from a preponderance of the evidence that such violation caused antitrust injury to the business or property of Windmere?

YES ✓ NO _____

If you have answered "YES" to one or more of INTERROGATORIES NOS. 1(d), 2(e) or 3(b), then answer the following INTERROGATORY; otherwise, do not answer INTERROGATORY NO. 4.

INTERROGATORY NO. 4

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Windmere for the damage to its business or property which you have found was caused by the conduct of the counterdefendants in violation of the antitrust laws.

ANSWER IN DOLLARS AND CENTS, IF ANY: _____
29,881,419

SO SAY WE ALL

/s/ Illegible
FOREPERSON

Date: April 6, 1990

APPENDIX L – ORDER OF THE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA,
ENTERED SEPTEMBER 3, 1991

[Caption Omitted in Printing]

ORDER

THIS CAUSE has come before the Court upon (1) Counterdefendants', U.S. Philips Corporation ("Philips"), North American Philips Corporation ("NAPC") and N.V. Philips Gloeilampenfabrieken ("N.V. Philips") Motion for Judgment Notwithstanding the Verdict or a New Trial on Counterplaintiff Windmere Corporation's ("Windmere") Antitrust Counterclaims, and (2) NAPC's Motion for Judgment Notwithstanding the Verdict on the Unfair Competition Count, and (3) NAPC's Motion for a New Trial on the Unfair Competition Count. After reviewing the lengthy pleadings submitted by both parties and taking oral arguments at the August 20, 1990 conference, for the reasons set forth below Plaintiffs/Counterdefendants' motions are DENIED.

In October 1984, Philips filed suit in the Southern District of Florida against Windmere and Izumi Seimitsu Kogyo Kabushiki Kaisha, a Japanese Corporation, for infringement of Philips' electric shaver patent and against Windmere for unfair competition. The essence of the Complaint was that Windmere's Ronson rotary razors violated Plaintiff's patents on Norelco rotaries, and that Windmere created confusion among consumers by marketing the Ronson razor to appear as if it were nearly identical to the Norelco rotaries. Windmere in turn filed a Counterclaim alleging that Philips has monopolized and attempted to monopolize the electric rotary shaver market, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2 (1982), and that Philips and N.V. Philips (the Dutch corporation) conspired to restrain trade in

that market, in violation of Section 1 of that Act, 15 U.S.C. 1 (1982). As stated by the Federal Circuit, however, it appears that Windmere has abandoned its Section 1 claim. *U.S. Philips Corp. v. Windmere Corp.*, 861 F.2d 695, 697 (Fed. Cir. 1988).

Both the antitrust and patent issues were tried to a jury. At the close of Windmere's antitrust case, this Court granted Philips' motion for directed verdict on those issues holding that Windmere had not adduced sufficient evidence to support a jury verdict in its favor as to its claim under Section 2 of the Sherman Act, 15 U.S.C. 2 (1982). We then submitted the patent and unfair competition issues to the jury, which ruled for Philips on the patent claim and for Windmere on the unfair competition claim. Windmere appealed our Order granting Philips' motion for directed verdict, and on November 14, 1988, the Federal Circuit reversed and remanded the cause for a new trial on the antitrust issues concluding that there existed sufficient evidence in the record in order to properly submit Windmere's antitrust counterclaim to the jury. *U.S. Philips Corp. v. Windmere Corp.*, 861 F.2d 695 (Fed. Cir. 1988).

In accordance with the Federal Circuit opinion, a second jury trial was held on Windmere's Antitrust counterclaim in the spring of 1990, at which time almost three dozen witnesses testified over a four week time period. At its conclusion, the jury deliberated, found in favor of counterplaintiff Windmere, and awarded Windmere \$29,887,419.00 in damages. The jury also found in favor of Windmere as to Philips' Unfair Competition claim. Counterdefendant now seeks a Judgment Notwithstanding the Jury's Verdict ("JNOV"), or in the alternative a New Trial on these same Antitrust claims. In addition, Philips requests a new trial and a JNOV on its unfair competition claim.

I. ANTITRUST COUNTERCLAIM

a. Standard for JNOV

In considering a motion for a JNOV, as in a motion for a directed verdict, the trial court "is not permitted to weigh the evidence," *Rabun v. Kimberly Clark Corp.*, 678 F.2d 1053, 1057 (11th Cir. 1982), but rather all evidence must be viewed in a light and with all reasonable inferences most favorable to the non-moving party. *Watts v. Great Atlantic and Pacific Tea Co.*, 842 F.2d 307, 309 (11th Cir. 1988). In light of this standard, Windmere, as the non-moving party, is entitled to a review of the record evidence in a light most favorable to it. Philips' motion could be granted only if, considering the facts in this light, no more than a scintilla of evidence favors Windmere. *Id.* The motion must be denied so long as "substantial evidence" exists which favors the non-moving party; "substantial evidence" exists when reasonable men "might reach different conclusions." *Zaklama v. Mt. Sinai Medical Center*, 842 F.2d 291, 295 (11th Cir. 1988) (emphasis added); *Watts*, 842 F.2d at 309, quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1988). In our view, the record demonstrates that "substantial evidence" was presented in support of the jury's Sherman Act Section 2 verdict in favor of Windmere.

b. Standard for a New Trial

When ruling on a motion for a new trial, a trial judge must determine "if in his opinion, 'the verdict is against the clear weight of the evidence . . . or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.'" *United States v. Bucon Construction Co.*,

430 F.2d 420, 423 (5th Cir. 1970), quoting *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 352-53 (4th Cir. 1941). A new trial is appropriate only if the great weight of the evidence favors the moving party — merely the greater weight is not sufficient. *Watts*, 842 F.2d at 310. See also *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360, 363 (5th Cir. 1980). Furthermore, in this Circuit great deference is given to the jury's determination. A refusal to allow a new trial will generally be reviewed under an abuse of discretion standard. *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984). Indeed, the Eleventh Circuit has observed that granting a new trial is a drastic remedy and should only be used sparingly. *Id.*

In the instant case, the jury expressly found after a lengthy trial that Windmere prevailed on its Sherman Act claims. After extensively reviewing the record, including the transcripts and relevant documents, we believe that the jury's decision was based on evidence properly received and resulted in no manifest injustice. Therefore, we must DENY Philips' Motion for a New Trial on the Antitrust counterclaims.

c. Analysis

After reviewing the pleadings, and as clearly delineated by the moving party at the August 20 conference, Philips seeks a JNOV or a new trial based primarily on four main grounds: first, Philips claims that there was no proof that Windmere suffered damages amounting to approximately \$30 million dollars; second, Philips asserts that Windmere failed to prove antitrust liability on Philips's behalf because the jury instructions on predatory pricing were improper; third, Philips contends that Windmere failed to prove that Philips' pricing policy was below total cost

because Mr. Bloom's methodology was erroneous; and finally, Philips argues that a new trial is required because the jury's answers to the special interrogatories submitted are irrenconcilably inconsistent.

1. Damages

As to Philips' initial argument regarding damages, Philips claims that Windmere's proof does not support the large amount of damages awarded — \$29,887,419.00. Specifically, Philips argues that the jury's award is erroneous because the jury relied on a deficient document submitted by Windmere in calculating the amount and because Windmere failed to prove that the damages were "caused" by Philips' predatory pricing of its 1320 and 1615 razor models. Philips first states that in "awarding damages, the jury simply added up the figures presented in [exhibit-model] 1019 for 1984 through 1991." Philips' Memorandum at 79. Philips contends that exhibit 1019 is "riddled with unsupportable speculations, unfounded assumptions and conclusions which bear no relationship to logic or fact" Philips' Memorandum at 79. Second, Counterdefendant maintains that Windmere failed to prove that its damages through 1991 were "caused" by the prices of the Philips' 1320 and 1615 models. Philips reminds us that Windmere has the burden of showing that its injury was in fact caused by Defendant's unlawful acts rather than other factors such as lawful competition, mismanagement or changed economic conditions. *Foremost-McKesson, Inc. v. Instrumentation Laboratory, Inc.*, 527 F.2d 417, 419 (5th Cir. 1976). We are not persuaded.

Exhibit 1019, admitted at trial, is the damage model illustrating the projected sales figures that Windmere claimed it would have achieved but for Philips' illegal

conduct. In order to explain the significance of this model, Windmere presented Dr. Ozanne as its expert witness on damages. Dr. Ozanne's expertise was not questioned at trial and is not the basis for this motion. In fact, his examination at trial was an extensive one — approximately four hours. Instead, Philips' principal argument seems to be that Dr. Ozanne's exhibit 1019 model was erroneously premised on Mr. Friedson's, the Chief Executive Officer of Windmere, "oral projections" created after the lawsuit was filed. Mr. Friedson is the president of a company that has gone into many product lines and the testimony established that he had extensive experience in making business projections such as the one at issue. The jury quite apparently credited his extensive experience in making such projections and decided to calculate damages in accordance with his and Dr. Ozanne's expert testimony and guidance. Mr. Friedson was cross-examined extensively at trial. While it is true that we did not admit at trial the hard copy of Mr. Friedson's projections, Mr. Friedson's business projections, which he tendered to the Board of Directors of Windmere, were admitted into evidence. The following colloquy occurred at trial:

Q. And did you later on prepare that document which in effect reviewed what you had given to the board?

A. Yes, sir.

THE COURT: When did he make the statement to the board?

A. In January, February of '84.

THE COURT: The truth of the matter is, again, it is a tempest in a teapot. You can establish what it is that he had to say by asking him what it is he said. If he doesn't remember, you can show him the

document and ask to what extent it refreshes his recollection. You can even have him go down to an easel and recount in writing on the easel his recollection of what he said.

Trial transcript at 1401. As stated at the August 20 conference, Philips is not objecting to the introduction of 1019 into evidence but rather to the jury's "acceptance" of the model because as Philips puts it, Friedson's projections are meritless, and because model 1019 is based on assumptions made by Ozanne that were allegedly never proven. August 20 conference transcript at 69-71.

We first point out that the Supreme Court has long recognized that in antitrust cases, "the vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 567 (1981). It is also established that an antitrust plaintiff's damages can be approximated since it is unfair to penalize the victim of an antitrust violation because it cannot establish its damages with the degree of mathematical certainty demanded by the antitrust wrongdoer. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845 (5th Cir. 1981) (citations and quotations omitted). The Fifth Circuit also held in *Malcolm* that the damage figure may contain imperfections, but this does not render the estimate unsound. *Id.* at 858. In light of this standard, we are mindful that Dr. Ozanne incorporated record evidence on the business projections of Windmere in the shaver business into his 1019 model, he tested the veracity of Windmere's projections on other ancillary product lines and factored those findings into his projections. Dr. Ozanne went into great detail in describing to the jury how he analyzed Mr. Friedson's previous projections and

how these projections became reliable or viable over time¹. We believe that his methodology is supported by the record and that his testimony together with Friedson's account provided sufficient evidence for the jury to reach their decision on damages.

In addition, and as stated above, both Dr. Ozanne and Mr. Friedson were cross-examined extensively and vigorously by extremely able counsel. For example, Philips' cross of Dr. Ozanne suggested that the projections were not credible, comparing the experts' conclusions with a "Schick" projection made by Windmere. Mr. Friedson in turn testified that the projection used in cross was not at all relevant because that projection involved "parts" and no rotary shavers. Inasmuch as Dr. Ozanne and Mr. Friedson are unquestionably experts in their business-related fields, both experts provided extensive testimony supporting the credibility of model 1019, and both were thoroughly cross-examined at trial, we are hard pressed to find that the jury was not given adequate and proper proof on the issue of damages. As stated by Philips itself at oral argument, the objection is not the introduction of the model into evidence — there is no motion to

¹We also note in passing that the Eleventh Circuit has held that "an expert witness's opinion testimony does not have to be based upon admissible evidence. Such opinions, however, must be based upon 'facts or data . . . of a type reasonably relied upon by experts in the particular field . . .'" *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1580 (11th Cir. 1985) (citations omitted). Surely, business projections formulated by the Chief Executive Officer of a company would be facts from which an expert such as Ozanne would reasonably rely on in providing his testimony, especially where that officer has prepared many such projections in his official position over an extended time frame. In any event, Philips did not argue that Mr. Friedson's type of report is not the type relied upon by antitrust damage experts.

strike exhibit-model 1019. Rather, the objection goes to the jury's "acceptance" of the model given Philips' belief that Mr. Friedson's projections and Dr. Ozanne's assumptions were meritless and unsupportable. That argument, however, really involves the "weight" that the jury accorded to the model in their calculation of damages, and as clearly established in this Circuit, our role is not to "weigh" the evidence — that determination lies solely in the discretion of the jury. *Rabun*, 678 F.2d at 1057; *Watts*, 842 F.2d at 307. We also remind Philips that, as in any jury trial, the issue of the evidence's weight could have gone in any number of directions. On the record, the jury could have credited Philips' experts; plainly, they could have also rejected all experts.

In sum, the jury members reviewed the evidence, which was part of the record, credited Windmere's experts and documents, and reached their conclusions accordingly. We are not prepared to disturb the jury's determination based on Philips' disagreement as to Windmere's experts' projections or because we might not have awarded the same damages.

As to Philips' argument that there was no evidence from which the jury could have found that Windmere's damages were "caused" by Philips' pricing of its 1320 and 1615 models, we remind Philips again that this is a determination placed solely in the hands of the jury. There is no question that Windmere presented evidence which showed that Philips dropped their prices essentially thirty (3) to thirty-five (35) percent, and that these prices were raised as soon as Windmere left the market².

² Notably, after reviewing the evidence presented at the first trial by Windmere, the Federal Circuit stated:

There was evidence from which the jury could have concluded:

[footnote continued]

The jury was given sufficient evidence from which it could find that Philips' acts caused Windmere antitrust damage and that Philips' conduct gave Windmere a basis to institute an antitrust cause of action. In fact, the Federal Circuit, in reversing our directed verdict against Windmere and having looked at Windmere's evidence the first time around, explicitly found that "Windmere presented sufficient evidence of predatory pricing," *Windmere*, 861 F.2d at 703, and that "[i]f the jury had credited Windmere's evidence and rejected Philips', it could have returned a verdict for Windmere" on the antitrust counterclaim. *Id.* at 704. Obviously, that is what occurred in the second trial, and therefore, we must DENY Philips' motion for JNOV or for a New Trial on the issue of damages.

1. That entry barriers to the rotary electric shaver market are substantial, if not high — the need to have a well-known brand with wide consumer acceptance, the limited number of brands that satisfy this requirement, and the substantial advertising expenditures required to attain a foothold in the market.

2. That Philips introduced its lower-priced older models only in response to Windmere's entry into the market with its cheaper Ronson rotary electric shaver.

3. That Philips cut the price of its shavers in an endeavor to eliminate Windmere from the market. . . . That this purpose of Philips was further shown by the evidence that, when Windmere withdrew from the rotary shaver market, Philips promptly discontinued the sale of its lower-priced old model.

Windmere, 861 F.2d at 703. The evidence presented at the second trial was no less compelling than the first time. Accordingly, we are hard pressed to give merit to Philips' argument that there was a lack of evidence indicating that Philips' tactics caused harm to Windmere.

2. Jury Instructions

Philips' second main argument in support of its motion for a new trial is that the deliberative process was "polluted" because the Court's two (2) jury instructions on predatory pricing and monopolization were improper, confusing, and inconsistent. Again, we deny Philips' motion on this ground and reject its arguments. After an extensive review of the controlling case law on predatory pricing and a thorough charging conference with the parties, we decided to provide the jury with two balanced liability instructions reflecting the law stemming from the Eleventh Circuit decision in *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988), and the Federal Circuit decision on this particular case, *Windmere*, 861 F.2d at 704. We initially recognized that the Supreme Court recently declined to "consider the proper definition of predatory pricing." See *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S.Ct. 1884, 1892 n.10 (1990). Therefore, we looked to the applicable law in the Eleventh Circuit and noted that on October 27, 1988, this Circuit held that "the test for predatory pricing must consider subjective evidence and should use *average total cost* as the cost above which no inference of predatory intent can be found." *McGahee*, 858 F.2d at 1496 (emphasis added). Thereafter, on November 14, 1988, the Federal Circuit reviewed the case, focused on Windmere's Sherman Act claims, and held:

To be sure, Philips introduced evidence designed to show that its actions were legitimate competitive responses prompted by the entry of Windmere into the market. The evaluation of all the evidence bearing on the nature of Philips' actions and the inferences to be drawn from the evidence, was for the jury to determine. If the jury had credited Wind-

mere's evidence and rejected Philips', it could have returned a verdict for Windmere. Evidence that a firm holding 90 percent of a market that has substantial entry barriers drastically slashes its prices in response to the competition of a new entrant, for the purpose and with the effect of eliminating that entrant, is sufficient to show monopolization, in violation of section 2 of the Sherman Act.

Windmere, 861 F.2d at 703-04.

Therefore, in accordance with these binding instructions, we first cautioned the jury with an instruction headed "Predatory Pricing Distinguished From 'Competition'" and clearly told the jury that Philips had the right to engage in ordinary competitive behavior, which was to be contrasted with restrictive or exclusionary conduct to maintain control of the market. Next, we instructed the jury on predatory pricing defining that phrase in terms of sales below *average total cost*, the controlling standard as enunciated by the Eleventh Circuit in *McGahee*. Then, we instructed the jury that they must *first* consider that issue (i.e. predatory pricing defined as pricing below average total cost) *before even considering the second alternative theory* — the Federal Circuit law on "monopolization." As an alternate theory, and one requested by Windmere, we instructed the jury, in accordance with the Federal Court's unambiguous mandate in the *Windmere* decision and in order to preserve the law stemming from that case, that one can show "monopolization" with evidence indicating that a firm holding 90 percent of a market that has substantial entry barriers, drastically slashed its prices in response to the competition of the new entrant, for the purpose and with the effect of eliminating that entrant.

Philips contends that these instructions were improper because we should have used "average variable cost" instead of the "average total cost" test mandated in *McGahee* and because the jury's deliberative process was "polluted" by the second alternative Federal Circuit instruction since it was inconsistent with the *McGahee* predatory pricing instruction. We disagree. First, as to the propriety of the first *McGahee* predatory pricing instruction and as to the average total cost test, there can be no question that an appellate court's decision is the law of the case at the district court level. We are undoubtedly bound by the current law in the Eleventh Circuit and we formulated the instruction accordingly. See *Leggett v. Badger*, 798 F.2d 1387, 1389 (11th Cir. 1986); *Dorsey v. Continental Casualty Co.*, 730 F.2d 675, 678 (11th Cir. 1984). Also, both parties agreed at trial to the use of the *McGahee* predatory pricing instruction and to the average total cost test. Philips' arguments as to the *McGahee* instruction are without merit.

As to the alternative theory — the Federal Circuit "monopolization" instruction — Philips conceded at the August 20 conference that, under controlling case law, a jury "can . . . deal with alternative instructions." August 20, 1990 conference transcript at 38-39. Philips' main argument, however, is that these instructions were so inconsistent as to confuse the jury and prejudice their judgment. We point out, however, that as specifically instructed, the issue of predatory pricing had to be decided by the jury *before* ever reaching the alternative theory. Indeed, the form of the interrogatories which the jury had to answer point by point required the consideration of these issues in the order directed by this Court. Philips suggests nevertheless that there was some confusion about the jury's task and that the jury actu-

ally did something or adopted a procedure totally inconsistent with this Court's direction. We reject this suggestion as it only amounts to an unsupported allegation. We will not reverse the jury verdict simply because Philips suspects that the jury did not follow the Court's instruction or was not able to understand its task. By the time the jury reached the interrogatory setting forth the alternative theory as mandated by the Federal Circuit, it had already found that Philips used below cost predatory pricing in eliminating Windmere's competition in violation of Section 2 of the Sherman Act. This discussion on the second alternative instruction appears to be moot since the jury found that Philips's conduct violated the Sherman Act under *both* instructions.

In addition, we disagree that the two instructions were inconsistent so as to constitute reversible error. Although Philips does not agree with the appellate court, the alternative theory simply reflects the law of this case on the issue of "monopolization" decided by the Federal Circuit as it reviewed this precise case. In fact, the Federal Circuit found nothing inconsistent in the notion that a cost case or predatory pricing case existed, along with a theory based on the maintenance of monopoly power and the preservation of a 90% share by willfully eliminating Windmere with sustained 40% price cuts forcing Windmere' to exit.³ Any fair reading of the Federal Circuit's

³In fact, the Supreme Court has considered the matter by emphasizing the use of exclusionary practices with a bad state of mind for the purpose of maintaining a monopoly and eliminating all competition, irrespective of the objective question of whether the practice did or did not produce a profit. In *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), the Supreme Court stated that the pricing practices "maintained the power to exclude competitors" — that the defendants "have the intent and purpose

[footnote continued]

Windmere opinion compels the conclusion that the Circuit reviewed, accepted, and remanded the cause to this Court on both theories. The Federal Circuit referred to both theories and found that both stated claims under Section 2 of the Sherman Act. Again, we are bound by the law as set forth by the Circuit in *McGahee* (on the average total cost test) and in *Windmere* by the Federal Circuit (on the alternative monopolization theory). In essence, Philips disagrees with the law of this case, but this is not the appropriate forum to "review" Circuit rulings. We have done no more than apply the binding law of this case through the alternative instructions. We have followed the appropriate legal standards in so doing. Philips' assumption that the jury was "polluted" by being presented with both alternative theories does not merit reversing the jury's verdict.

3. The Average Total Cost Test

Philips' third principal argument is that *Windmere* failed to prove that Philips' price was below total cost because the methodology utilized by Mr. Bloom was erroneous. Specifically, Philips maintains that *Windmere's* proof on the *McGahee* average total cost "predatory pricing" test was insufficient. At the August 20 conference, Philips argued that the testimony of Mr. Bloom, *Windmere's* expert accountant, was the only evidence *Windmere* presented at trial on the issue of whether Philips priced the 1320 and 1615 below average total cost. Philips asserts that Bloom's testimony, including his use of exhibit 916 (Norelco's razor Division

to exercise that power." Also, in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), the practices condemned, including "containment pricing", were used according to the Supreme Court "consciously" to maintain monopoly power.

income statement), was replete with unreasonable assumptions, hypothetical numbers, and baseless methods of allocating costs. Philips also takes issue with Mr. Bloom's methodology in "ignoring" the *actual* costs of the 1320 and 1615 models and relying instead on assumptions and projections of advertising, freight, and handling costs. Philips stated in its brief and at argument that Bloom simply reviewed Norelco's razor division income statement (exhibit 916), took a percentage of each of the costs that were listed including advertising, warranty, and bad debts, and allocated those costs on a per unit basis to the two shavers that were at issue. Philips argues that according to the Supreme Court's ruling in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), such predatory pricing evidence must be unambiguous and evaluated with care. Because Philips believes that Bloom's methodology was improper and mainly because there was no evidence that such costs were in fact incurred, Philips asks this Court to reverse the jury verdict on the ground that there was insufficient and improper evidence for the jury to determine that Philips engaged in predatory pricing.

We reject Philips' argument. The Federal Circuit, in reviewing this case, has already addressed and decided this precise issue in *Windmere's* favor. The Court of Appeals in *Windmere* held that the advertising issue was one that specifically covered different theories of allocation, and that it was a question for the jury as to how the advertising expenses should be allocated. Indeed, the Federal Circuit stated that whether it is on a per unit basis, which was one of the methods used by Mr. Bloom, or on a revenue basis was a matter for the jury to decide. The Court went even further, holding that this also applied to the allocation of operating expenses,

cost of batteries, freight and handling, and suggesting that Windmere could use "projections" rather than actual costs. As an illustration of these various points, we recall the rulings made by the Federal Circuit in *Windmere*:

[T]he determination whether Philips sold below . . . cost required resolution of . . . whether Windmere's projections for certain items of Philips' cost — batteries, freight and handling — were sufficient to establish those costs. The district court held that on both of these elements of its case, Windmere failed to present sufficient evidence to create disputed factual issues for the jury. We disagree.

In ruling that Windmere had not presented substantial evidence that Philips' advertising expenses were variable rather than fixed costs to create a jury question on that issue, the district court relied on the testimony of Philips' economist expert, Mr. Kamerschen, that the Norelco advertising was a fixed cost, and stated that "Windmere failed to bring forth any information to the contrary on the cross-examination of this witness." It was for the jury, however, and not for the court, to determine the credibility of this witness and the weight to be given his testimony. The jury was not required to accept his expert testimony, even if it was uncontradicted. See *Quock Ting v. United States*, 140 U.S. 417, 420, 11 S.Ct. 733, 734, 35 L.Ed. 501 (1891); see also *Archer v. Commissioner*, 227 F.2d 270, 273 (5th Cir. 1955).

To counter Mr. Kamerschen's opinion, Windmere relied on Norelco's 1984 income statements, "which listed advertising in a category entitled variable expenses." The court rejected this evidence as insufficient to create an issue for the jury . . . As was the case with Mr. Kamerschen's expert testimony, however, this was evidence that the jury was entitled to consider . . .

[W]e conclude that, in determining the amount of Philips' advertising expenses that are variable costs, the proper treatment of the approximately \$6.6 million Philips received from its Dutch parent in 1985 was an issue for the jury to decide.

The question whether Philips' advertising expenses should be allocated to the 1615 and 1320 models on a per unit basis or on the basis of revenue received also was a matter for the jury and not for the court to decide. We reach that same conclusion with respect to the propriety of Windmere's use of 1985 projections, rather than Philips' actual operating costs (which apparently were not available to Windmere), to determine Philips' cost of batteries, freight and handling.

Windmere, 861 F.2d at 704-05.

In light of the foregoing, there is no question that the issues which Philips have raised regarding the allocation of costs have been squarely decided by the Federal Circuit. The Federal Circuit found that Philips' objections as to Bloom's use of the per unit basis of allocation and methodology comprised of reasonable projections rather than actual costs were proper methods of determining predatory pricing, and that in any event, the weight to be given to these procedures rests solely in the jury's hands. Philips was given the opportunity to introduce its own experts and argue to the jury that Mr. Bloom's methodology was "unreasonable." Accordingly, we must DENY Philips' Motion for a JNOV or a New Trial based on these grounds.

4. Inconsistent Responses to Interrogatories

Philips' final main assertion in supporting of its motion for a New Trial or JNOV is that the jury's responses to

special interrogatories Nos. 1 and 2 are so hopelessly irreconcilable that a new trial is in order on all the Sherman Act Section 2 issues. In the instant case, the jury rendered two interrogatory responses on the issue of relevant market:

Special Interrogatory No. 1(a), which related to Windmere's monopolization claim, asked the jury:

Do you find from a preponderance of the evidence that during the relevant time period, rotary shavers constituted a relevant product market?

The jury answered this question "yes."

Special Interrogatory No. 2(a), which related to Windmere's attempt to monopolize claim, asked the jury:

Do you find from a preponderance of the evidence that either rotary razors or rotary razors and foil razors sold below \$40 constitute a relevant market?

The jury responded, "Neither."

In light of these answers, Philips cites to *Burger King Corp. v. Mason*, 710 F.2d 1480, 1489 (11th Cir. 1983) and states that if a jury's responses to special interrogatories are so inconsistent that they cannot be reconciled fairly, a new trial must be ordered. We reject Philips' contention for two reasons. First, we are not convinced that the responses are "irreconcilably" inconsistent so as to require a new trial under the controlling case law. Second, and foremost, Philips has waived its argument on this issue under binding precedent because it did not challenge the consistency of the verdicts before the jury was excused.

As to the inconsistency argument, the Eleventh Circuit held in *Mason* that "a trial judge must make all reasonable efforts to reconcile an inconsistent verdict and if there is a view of the case which makes the jury's ans-

wers consistent, the court must adopt that view and enter judgment accordingly." *Mason*, 710 F.2d at 1489. The Court further held that "the test employed in determining whether a conflict in the verdict can be reconciled is whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted" *Id.* (quotation omitted). Here, we believe that there is a view of the case which makes the jury's answers to interrogatories Nos. 1 and 2 consistent.

Windmere proceeded on two theories. The first was that rotary shavers constitute a separate market distinct from the foil market. The second position which Windmere took was that there was also evidence of a market "under \$40." The exhibits and statistics in evidence demonstrated, for example, that in the under \$40 market, Philips originally had a smaller percentage of that business, but by driving Windmere out of "that market," Philips obtained 70% of the total "under \$40 market" by 1989. This issue was presented in terms of Windmere's alternative theory that, passing the monopolization case, Philips attempted to monopolize that "under \$40 market." The jury could, based on the evidence presented, have decided the case for Windmere or Philips. There was substantial evidence of record which could have been used to support either position. The fact that the jury determined that there was no "rotary market under \$40" and yet there was a full rotary market is a finding which is hardly "irreconcilably" inconsistent with the record, and the jury could easily have reached that conclusion.

In fact, the jury was instructed regarding the product line. We stated that the "alternative" Windmere market was "all" electric shavers sold at under \$40. The jury instruction to that effect read:

In this case, Windmere claims the relevant product market is rotary electric razors. In the alternative, Windmere has claimed that the relevant product market consists of all electric shavers sold under \$40.00. The Counterdefendants, North American Philips and N.V. Philips, on the other hand, claim that the relevant product market is broader than rotary electric shavers and that it includes at least all electric shavers and maybe all shaving devices, both wet and dry.

We believe that the second interrogatory answered by the jury can be deemed as "consistent" with the first especially when read in context with the instruction. The special interrogatory is susceptible to a rational instruction that the market referred to — whether it was rotary shavers or "all" electric shavers — had to consist of just those shavers "under \$40." The instruction and interrogatory admit to that circumstance and, therefore, we find that there is not such an inconsistency which would require the reversal of the jury verdict. In any event, we need not even answer this question today since Philips has waived its argument on the special interrogatories.

Despite what the law might be in other Circuits, the Eleventh Circuit has held that a party waives its argument that the jury verdict was inconsistent by not raising it before the jury is dismissed under Fed.R.Civ.P. 49(a). See *Itel Capital Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253, 1261 (11th Cir. 1983) ("appellees waived their objection to alleged inconsistencies in the jury's answers to the special interrogatories by failing to object at the time the verdict was rendered" (citations omitted)) and *Golub v. J.W. Gant & Associates*, 863 F.2d 1516, 1521 n.4 (11th Cir. 1989). In this case, Philips' first and only mention of the inconsistency issue was raised in its

memorandum in support of a New Trial or JNOV. Philips' Memorandum at 98. Philips did not even make reference to this argument at the August 20 conference. Although Philips is correct in pointing out that other circuit courts of appeals have held that there is no waiver under Rule 49(a) for failing to object before the jury is discharged, the Eleventh Circuit has taken the opposite position that a waiver occurs if no objection is made at the time the verdict is rendered. As the Eleventh Circuit stated in its most recent treatment of the issue:

Even if construed as a challenge to the verdict's inconsistency, however, Gant's [defendant's] appeal is waived. In this Circuit, all challenges to the consistency of special verdicts must be raised before the jury is excused (citations omitted)).

Golub, 863 F.2d at 1521 n.4. In light of this statement of the law and because Philips did not challenge the interrogatories until after the jury was excused, we must find that Philips has waived any such arguments.

In sum, and in view of the foregoing discussion, we do not find that Philips has made any persuasive argument mandating that we grant a JNOV in its favor or vacate the jury's verdict and hold a *third* trial on Windmere's antitrust counterclaim. The main arguments discussed above and the additional assertions made by Philips in its pleadings and at the August 20 conference fall short of satisfying the standard required to grant such drastic relief. Accordingly, we DENY Philips' Motion for JNOV or a New Trial on Windmere's antitrust counterclaim.

II. UNFAIR COMPETITION CLAIM

At the outset, we note that in both the Motion for JNOV and the Motion for a New Trial on the Unfair

Competition Count, NAPC challenges a number of issues, *all* of which were fully raised, adjudicated, addressed, briefed, argued, and decided by this Court at trial. We observe that NAPC has not presented any *new* arguments on these issues which would now require this Court to either grant a JNOV or a new trial on the Unfair Competition claim. Therefore, NAPC's motions are DENIED. Because the majority of the issues raised by these motions have been previously addressed and resolved by this Court for reasons detailed at length at trial and in the interest of judicial economy, we only briefly address the main points raised by NAPC below.

a. Motion for JNOV

As in the first trial, the second jury found against Plaintiffs by special interrogatories on *all* elements of their unfair competition claim. Plaintiffs nevertheless assert that "there is no evidence from which a reasonable, fair-minded person could reach the verdict for the jury." NAPC's Memorandum in support of its Motion for JNOV at 10. NAPC specifically argues that there was no substantial evidence to support any of the jury's findings relating to (1) functionality of the Norelco design; (2) likelihood of confusion between the Norelco and Ronson shavers; and (3) secondary meaning of the Norelco trade dress. Since NAPC must prove all three of these elements to be entitled to relief in an unfair competition claim, *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966 (11th Cir. 1983), the jury verdict must be upheld if there was evidence to support the jury's findings on any one of the elements. As to the element of functionality, we recall that if a design is "functional," the public is free to copy it with impunity. *John H. Harland Co.*, 711 F.2d at 982. A design need not be the only possible design or

even the single best design to be functional; it is functional if it is the best or one of the few superior designs. *See, e.g., In re Bose Corp.*, 772 F.2d 866, 872 (Fed. Cir. 1985); *In re Morton-Norwich Products, Inc.*, 671 F.2d 1332, 1341 (C.C.P.A. 1982). We believe, contrary to NAPC's portrayal, that Windmere presented substantial evidence to show that the Norelco design look was primarily functional and enough evidence to at least allow the jury to decide the issue. Among the evidence presented at trial was the following:

(1) Mr. Arato, Windmere's functionality expert, testified at great length that a "telephone hook" shape was the best way to design a shaver. (Trial Tr. Vol. 6, pp. 871-84);

(2) Mr. Arato testified that the three heads should be arranged in a triangle for the most efficient shave. (Trial Tr. Vol. 6, pp. 878-79);

(3) Mr. Arato compared the "telephone hook" shavers to the old Norelco "boat" shavers and found the "telephone hook" shavers to be far superior. (Trial Tr. Vol. 6, pp. 877-81);

(4) Sears and Remington, the only other companies in the United States to sell rotary shavers (other than Windmere) also use a "telephone hook" design. In fact, Sears sold a "telephone hook" shaver in 1973, even before Norelco began selling its "telephone hook" shavers. (Trial Tr. Vol. 2, pp. 114-15; Vol. 5, p. 771; Plaintiff's Ex. 30; Defendant's Exs. 58, 356);

(5) the jury was shown that even the wet razors use the "telephone hook" design (Trial Tr. Vol. 6, pp. 873-75);

(6) Windmere asked Izumi to make a shaver with a slimmed-down handle for functional reasons — to make

the shaver easier to hold. (Trial Tr. Vol. 5, pp 700-04, 774-75);

(7) the United States Patent and Trademark Office refused to register Philips' triangular faceplate for functional reasons. (Trial Tr. Vol. 7, pp. 1194-98); and

(8) Finally, Norelco's own advertising continuously touted the functional advantages of its "telephone hook" design. (Defendant's Ex. 329, 371). See, e.g., *In re Bose*, 772 F.2d at 871-72. For example, Philips' own advertising stated:

Not only designed to fit your hand, but also cleverly bent to reach your face so you don't have to do a lot of bending and reaching yourself.

Surely, there was more than just a "scintilla of evidence" in the record from which the jury could find that the design at issue was "functional." Accordingly, NAPC is not entitled to a JNOV on the unfair competition claim. In viewing the evidence in the light most favorable to Windmere on a Motion for JNOV, *Watts*, 842 F.2d at 309, "substantial evidence" existed in favor of Windmere and accordingly, NAPC's motion must be and is hereby DENIED. In view of this conclusion, we need not detail and discuss the evidence with regard to the "likelihood of confusion" and "secondary meaning" elements, but we do note that after reviewing such evidence, we are satisfied that substantial evidence existed to support the jury's findings as to these factors too. As a result, NAPC's Motion for a JNOV on the Unfair Competition Claim is DENIED.

b. Motion for a New Trial

In its brief, NAPC acknowledges the heavy burden it bears of proving that we erred and that the error was

"inconsistent with substantial justice" as to require a *third* trial. See Fed.R.Civ.P. 61. As highlighted at the August 20 conference and as stated in its briefs, NAPC requests a new trial based primarily on two main grounds. First, NAPC argues that we erroneously placed the functionality burden of proof on NAPC instead of on Windmere. Second, Plaintiff asserts that the Izumi design patents should not have been admitted into evidence. For the reasons we have articulated at great length in the record at both trials, we reject NAPC's arguments and therefore DENY its Motion for a New Trial on the Unfair Competition Count.

Once again, NAPC argues that the burden of proving functionality should rest with Windmere and that our placement of the burden upon NAPC necessitates a new trial. The unquestionable fact that the Eleventh Circuit places the burden of proof of functionality upon the Plaintiff has been briefed and ruled upon by this Court. (Trial Tr. at 18-3382 to 3383). To reiterate, we note that the Eleventh Circuit has consistently stated that the "plaintiff," and not the defendant, carries the burden of proving that the features of the model are non-functional. See, e.g., *Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 716 F.2d 854 (11th Cir. 1983). The Court in *Brooks* explicitly held:

In order to prevail on a trade dress infringement claim under 43(a) of the Lanham Act, a *plaintiff must prove* that its trade dress has acquired secondary meaning, *that the features of its trade dress are primarily non-functional*, and that the defendant's product has trade dress which is confusingly similar to its own trade dress.

Brooks, 716 F.2d at 857 (emphasis added), citing to *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966

(11th Cir. 1983). Although the Eleventh Circuit recognized in *Harland*, 711 F.2d at 982 n.26, that "there is some confusion in the courts regarding whether the plaintiff has the burden of proving nonfunctionality," and did not squarely decide the question at that time, the Circuit a few years later explicitly stated:

The Eleventh Circuit . . . required plaintiff to establish that the features of the trade dress are "primarily non-functional."

CPG Products Corp. v. Pegasus Luggage, Inc., 776 F.2d 1007, 1011 (Fed. Cir. 1985).

In light of these explicit rulings from the Eleventh Circuit, we are hard pressed to merit NAPC's argument that we incorrectly placed such a burden on Plaintiff. Despite the fact that Plaintiff cites to law review articles and cases from other Circuits questioning such a procedure, the cases in our Circuit clearly support this decision in the instant case. There are no cases in the Eleventh Circuit holding that such a burden must be placed on the defendant.

Notwithstanding the foregoing discussion, we note in passing that regardless of where the burden should be placed, a new trial is certainly not warranted. As noted above, the evidence at trial substantially showed that the NAPC trade dress was functional, and we find that the result would not have been different even if the burden had been placed on Windmere. Therefore, for all the reasons stated, we must and hereby DENY NAPC's Motion for a New Trial based on the burden of functionality argument.

As NAPC's second major argument in support of its motion, it asserts that we should not have admitted the two Izumi design patents into evidence. NAPC again

states that "[these patents] allowed the . . . prejudicial and legally erroneous and irrelevant argument to be made to the jury in closing that the United States Government, in granting design patents on those shavers, had concluded that the Izumi shavers could not be copies of the Norelco design family Lanham Act." NAPC's Memorandum in support of Motion for New Trial at 27. We once again note that no intellectual property issue was briefed and argued more exhaustively at trial than this one, and NAPC has presented nothing new here to disturb our prior ruling.

We admitted the patents into evidence because NAPC unambiguously *stipulated* to them in the Pretrial Stipulation. The arguments raised by NAPC attacking the stipulation, including its possible prejudicial effect, were considered thoroughly by this Court at trial and we summarized:

Finally, with regard to the Gambrell matter, I thought a great deal about that, and I know of no way to say that Philips ought not to be bound by the stipulations that it entered regarding — the two stipulations, 11 and 12 [the Izumi design patents] — and I will permit that to come in.

* * *

I think there was a square, clean stipulation of fact as to that, and if I didn't permit you to put that in, I think the stipulated fact has no meaning here, and there was no exception or qualification taken to that.

* * *

The provisions of the law are clear. Our Local Rule is clear.

And [local rule] 14(b)(5) provides that the pretrial stipulation shall contain a concise statement of stipulated facts which will require no proof at trial, with reservations, if any. In the pretrial stip, the facts regarding the Izumi patents were stipulated to without reservation of any kind.

(Trial Tr. 13-2351 to 2352; see also Trial Tr. 7-1067 to 1072).

NAPC argues that notwithstanding the stipulation, it should be excused from such stipulation because it is necessary to "prevent manifest injustice." NAPC's Memorandum in support of Motion for New Trial at 30. NAPC then cites to *Noel Shows, Inc. v. United States*, 721 F.2d 327 (11th Cir. 1983), in order to illustrate that a district court has the discretion to deny or allow the admission of a stipulated fact into evidence at trial. However, NAPC has presented no evidence to establish "manifest injustice."

NAPC's sole argument is that manifest injustice is established because "the balancing of the harm under Rule 403 clearly favored exclusion of this irrelevant material." NAPC's Memorandum in support of Motion for New Trial at 31. Nothing that NAPC has presented to this Court indicates that these design patents could not have been admitted and that we did not have the discretion to enforce the stipulation and to allow it into evidence. We reasoned that both parties had negotiated, agreed to the stipulation in good faith, and that such an exclusion would prejudice Windmere because it had relied on them in good faith and built some of its case around them. We further note in retrospect that no "manifest injustice" was ever shown regarding these designs during trial. In fact, in order to assure that no injustice would occur, a cautionary instruction was

drafted, agreed to by both parties, and submitted to the jury by this Court. In sum, NAPC was bound by its negotiated stipulation, and appropriate steps were taken to prevent any "manifest injustice" to occur. Moreover, even if we had excluded the evidence under Rule 403 without the stipulation, we believe it would hardly constitute "manifest injustice" to bind NAPC to its word. Because we find no "manifest injustice" stemming from the admission of the stipulations which would require a new trial, NAPC's Motion is DENIED.

In addition to the two main arguments discussed above, NAPC again takes issue with some of the jury instructions and with some of our evidentiary rulings at trial. As NAPC itself acknowledges in its brief, however, these issues were extensively discussed and briefed during the course of the trial and no new points have been raised at this time to alter our earlier decisions. See, e.g., NAPC's Memorandum in support of Motion for New Trial at 21. In sum and in view of the foregoing discussion, it is hereby

ORDERED AND ADJUDGED that (1) Counter-defendants' Motion for JNOV or a New Trial on Windmere's Antitrust Counterclaim, (2) NAPC's Motion for JNOV on the Unfair Competition Count, and (3) NAPC's Motion for a New Trial on the Unfair Competition Count are DENIED. DONE AND ORDERED at Miami, Florida, this 3rd day of September, 1991.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Counsel of record

**APPENDIX M – CERTIFICATE OF INTEREST
FILED IN THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT,
DATED FEBRUARY 17, 1992**

CERTIFICATE OF INTEREST

Pursuant to Rule 47.4 of this Court, counsel for the appellee, Windmere Corporation, certifies the following:

1. The full name of every party or amicus represented by Counsel is: Windmere Corporation
2. The name of the real party in interest represented by Counsel is: Windmere Corporation
3. The parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates, including those that have issued shares to the public, of appellee, Windmere Corporation are listed below:

Windmere Corporation
Catalina Lighting, Inc.

4. The names of all law firms and the partners or associates that appeared for the parties in the trial court are:

Edward L. Foote, Esq.
R. Mark McCareins, Esq.
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

Gary R. Jones, Esq.
HICKEY & JONES, P.A.
1401 Brickell Avenue
Suite 800
Miami, Florida 33131
(305) 371-8000

Gary M. Hoffman, Esq.
Charles Saber, Esq.
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

The names of all law firms and the partners or associates that are expected to appear in this Court for the parties now represented by me are:

Edward L. Foote, Esq.
R. Mark McCareins, Esq.
Thomas J. Wiegand, Esq.
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

Gary M. Hoffman, Esq.
Charles Saber, Esq.
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

/s/ R. Mark McCareins
R. Mark McCareins
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
Counsel for Appellee
Windmere Corporation

Dated: Chicago, Illinois
February 17, 1992

**APPENDIX N – SETTLEMENT AGREEMENT
BETWEEN NORTH AMERICAN PHILIPS
CORPORATION AND WINDMERE
DATED MAY 6, 1992**

SETTLEMENT AGREEMENT

This Settlement Agreement is made this 6th day of May, 1992 by and between North American Philips Corporation ("NAPC") and Windmere Corporation ("Windmere").

WHEREAS, in October 1984 NAPC sued Windmere in the United States District Court for the Southern District of Florida (the "Action") for patent infringement and unfair competition and Windmere brought counterclaims against NAPC under, among other statutes, the federal antitrust laws; and

WHEREAS, on April 6, 1990 a judgment was entered against NAPC on Windmere's antitrust counterclaim in the amount of \$89,644,257 plus attorneys fees, interest and costs, and on May 4, 1990 a judgment was entered on NAPC's unfair competition claims (collectively the "Judgment"); and

WHEREAS, certain post trial motions filed by NAPC were denied by the District Court in an order dated September 3, 1991; and

WHEREAS, on September 30, 1991 NAPC filed a Notice of Appeal to the United States Court of Appeals for the Federal Circuit which appeal is now pending; and

WHEREAS, NAPC and Windmere wish to compromise and settle all claims and counterclaims asserted in the Action as well as all claims which NAPC and Windmere may have against each other as of the date of this Agreement;

NOW THEREFORE, IT IS AGREED, by and between NAPC and Windmere that all claims which each may have against the other shall be settled and compromised on the following terms and conditions:

1. At 10:00 a.m. on May 11, 1992 (the "Closing Date"), at the offices of Sullivan & Cromwell, 250 Park Avenue, New York, N.Y. 10017 (the "Closing"), Windmere shall deliver to NAPC an executed motion to vacate the Judgment, in the form attached hereto as Exhibit A.

2. At the Closing, Windmere shall deliver to NAPC an executed General Release.

3. At the Closing, NAPC shall deliver to Windmere an executed General Release.

4. On the Closing Date, NAPC shall pay to Windmere the sum of \$57,000,000 by wire transfer in immediately available funds to Windmere's account at the Bank of New York, One Wall Street, New York, N.Y.; ABA #02100018, Account #8033297689, Attention: Agency Function Administration; Reference: Windmere.

5. The transactions described in paragraphs 1-4 shall be executed simultaneously and no one of them shall be deemed completed until all are completed. The completion of the transactions described paragraphs 1-4 shall constitute the complete performance by each party to this Settlement Agreement of their mutual obligations set forth in paragraphs 1-4.

6. NAPC and Windmere further agree that Windmere shall cooperate, to the fullest extent of its ability, with NAPC in filing the motion referred to above and in taking such other steps as may be necessary to vacate the judgment and the proceedings in the District Court relevant to the Judgment. It is the intention of all parties to this Settlement Agreement that the Judgment, the

opinion and the jury interrogatories on NAPC's unfair competition claim and Windmere's antitrust claim will be of no force and effect and shall have no precedential or other value, including, without limitation, any effect under the doctrines of collateral estoppel or res judicata; provided, however and without limiting the foregoing, Windmere's rights to the consideration described in paragraphs 3 and 4 above shall in no way be affected by any failure, for whatever reason, to realize the intention of the parties described in this paragraph 6.

7. This agreement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which shall be a single Agreement.

8. NAPC and Windmere shall consult with one another prior to the release of any public statements concerning the Settlement.

WINDMERE CORPORATION

by /s/ David Friedson
President

NORTH AMERICAN PHILIPS
CORPORATION

by /s/ Samuel J. Rozel
Samuel J. Rozel
Senior Vice President and Secretary

STATE OF FLORIDA) ss.:
COUNTY OF DADE)

On May 6, 1992 before me personally came David Friedson to me know, who by me duly sworn did depose and say that deponent is the President of Windmere Corporation, that deponent executed the above document by order of the Board of the corporation.

/s/ Marsha E. Wisecup
Marsha E. Wisecup
Notary Public
[SEAL]

STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

On May 6, 1991 before me personally came Samuel J. Rozel to me known, who by me duly sworn did depose and say that deponent is the Sr. V.P. & Sec. of North American Philips Corporation, that deponent executed the above document by the order of the Executive Management Committee of the Corporation.

/s/ Loretta L. Nassau
Loretta L. Nassau
Notary Public
[SEAL]

APPENDIX O – LETTER TO F. GINDHART, CLERK
OF THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT, FROM W. ANDROLIA,
DATED MAY 11, 1992

KODA & ANDROLIA

1800 CENTURY PARK EAST, SUITE 519
LOS ANGELES, CALIFORNIA 90067

WILLIAM L. ANDROLIA
H. HENRY KODA
ALEX CHARTOVE, OF COUNSEL
WASHINGTON OFFICE
2000 M STREET, N.W.
WASHINGTON, D.C. 20036

TELEPHONE
(310) 277-1931
FAX
(310) 277-4118

May 11, 1992

Francis Gindhart
Clerk of the Court
United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C.

Re: U.S. Philips Corporation, North American
Philips Corporation and N.V. Philips
Gloeilampenfabrieken v. Windmere Corporation and
Izumi Seimitsu Kogyo Kabushiki Kaisha
Appeal No. 92-1020

Dear Mr. Gindhart:

I am a counsel for Izumi Seimitsu Kogyo Kabushiki Kaisha ("Izumi"), a party to the above-captioned litigation while it was pending in the United States District Court for the Southern District of Florida. It has just come to my attention that plaintiffs-appellants U.S. Philips Corporation, North American Philips Corporation, and N.V. Philips Gloeilampenfabrieken (collectively

"Philips") and defendant-appellee Windmere Corporation ("Windmere") have filed or are about to file a Joint Motion to Dismiss this Appeal and to Vacate the Judgments Below. The purpose of this letter is to inform the Court that Izumi wishes to oppose this motion to the extent that the motion seeks to vacate the judgments, and to obtain an appropriate time schedule to file the necessary opposition.

The proceedings in the District Court involved several claims and counterclaims. U.S. Philips Corporation filed a patent infringement count against both Windmere and Izumi; and North American Philips Corporation filed unfair competition claims against Windmere alone, although pursuant to an indemnification agreement, Izumi provided the defense to that claim. Finally, Windmere filed antitrust and related counterclaims against all three Philips companies. This appeal involves only the unfair competition claims and the antitrust counterclaims, claims to which Izumi was not a named party in the District Court. I understand that Izumi is listed as an appellee on the cover sheets of the briefs filed by all the parties to this appeal; nonetheless, because it was not a named party to the specific claims appealed, Izumi is concerned that it may not be considered a party on appeal and would like to be heard in opposition to the Joint Motion because its rights may be adversely affected if the judgment below were vacated.

At the trial in the District Court, among other things, the jury found for Windmere on North American Philips' unfair competition claim, finding that North American Philips' asserted trade dress was functional and hence, not protectable, that there was no secondary meaning, and no likelihood of confusion. As stated above, Izumi was responsible for the defense of the unfair competition

claim (including settlement), pursuant to an indemnification agreement with Windmere. Since the judgment below was in favor of Windmere, the benefits of that favorable judgment should flow to Izumi, the party which provided and paid for the defense. Accordingly, Izumi has a direct interest that the judgment not be vacated and wishes to bring these facts and others to the attention of the Court in opposition to the Joint Motion.

On behalf of Izumi, I would appreciate guidance from the Court on the proper steps to take to preserve Izumi's ability to oppose the Motion to Vacate the judgment below. In particular, Izumi requests that no action be taken on the Joint Motion until it has had an opportunity to oppose the motion and that a schedule be set for the filing of that opposition. Thank you for your consideration.

Very truly yours,

/s/ William L. Androlia

William L. Androlia

Counsel for Izumi Seimitsu Kogyo

Kabushiki Kaisha

cc: William E. Willis, Esq.
Sheldon Karon, Esq.
Gary R. Jones, Esq.
Gary M. Hoffman, Esq.
The Honorable Robert H. Bork
Edward L. Foote, Esq.

**APPENDIX P – ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT,
ENTERED MAY 18, 1992**

[Caption Omitted in Printing]

ORDER

The parties have filed a Joint Motion to Dismiss the Appeal as Moot and Vacate the Judgments Below. Izumi Seimitsu Kogyo Kabushiki Kaisha has filed a letter requesting the opportunity to oppose the Joint Motion.

ACCORDINGLY, IT IS ORDERED THAT:

1. Izumi shall file an appropriate motion within ten days of the date hereof, accompanied by argument including an explanation of Izumi's standing to bring such motion.
2. The parties to the Joint Motion shall file any response within ten days thereafter.
3. The argument of the appeal in No. 92-1020, scheduled for June 3, 1992, is removed from the calendar.

FOR THE COURT

May 18, 1992
Date

/s/Francis X. Gindhart
Clerk

92-1020

**APPENDIX Q – SUPPLEMENTAL DECLARATION OF
WILLIAM L. ANDROLIA (WITH TWO ATTACHMENTS)**

[Caption Omitted in Printing]

**SUPPLEMENTAL DECLARATION OF
WILLIAM L. ANDROLIA**

I, William L. Androlia, declare as follows:

1. I have read the joint reply of Philips and Windmere to Izumi's opposition to the motion to vacate. In particular, I have read the statement contained on page five that "Izumi's counsel was aware that Philips was seeking a vacatur well before Philips entered into the settlement with Windmere, but did nothing to object to the vacatur prior to consummation of the settlement." That statement is categorically false.

2. On March 30, 1992, I received a letter from Edward L. Foote, Esq. who represented both Windmere and Izumi in litigation against Philips. In that letter, Mr. Foote stated "we have agreed on a specific number on which to base the settlement of [the Miami] case." He further stated "there are other negotiations of that settlement involving what to do with the outstanding judgment etc. that will also proceed." Mr. Foote further advised me that Philips' and Windmere's ongoing settlement discussions involved terms and conditions potentially adverse to Izumi's interest, thereby precluding him from participating further in those negotiations on Windmere's behalf. He informed me that further negotiations "will be negotiated by other attorneys who will proceed at the direction of [Windmere's President] David Friedson." (Attachment 1) Thus, it is my understanding that after March 30, 1992, settlement discussions were conducted

on Windmere's behalf by attorneys directed exclusively by Windmere and who reported exclusively to Windmere.

3. Immediately upon receiving the March 30 letter from Mr. Foote, I wrote to Mr. David Friedson, President of Windmere, and informed him: "We trust that in your decision as to what to do with the judgment, you will not agree to anything which would harm Izumi and/or its business in the United States or which might be a breach of the indemnity between Windmere and Izumi." (Attachment 1 [sic])

4. One day later, on April 2, 1992, I spoke with Mr. Friedson by telephone. Mr. Friedson informed me that the possibility of vacatur was among the terms of settlement being discussed by Philips and Windmere. In response, I told him that Izumi would oppose any effort by Philips and/or Windmere to seek vacatur of the Florida court's judgment on the antitrust and unfair competition claims. I asked Mr. Friedson to communicate Izumi's objection to vacate directly to Philips. I learned nothing further about the status of Philips' and Windmere's settlement negotiations until Friday, May 8, at which time I was informed by Charles Saber, Esq. (one of the attorneys for Izumi in the Chicago litigation, and one of the attorneys for Windmere and Izumi in the Florida action) that Philips and Windmere had entered into a settlement agreement. I was not told the terms of the settlement agreement at that time.

5. I did not learn that Philips and Windmere had agreed to seek vacatur of the Florida court judgment until May 11, 1992, when I was so informed by Charles Saber, Esq. I did not see a copy of the Philips/Windmere settlement agreement, or their joint motion to vacate until Tuesday, May 12, 1992, the day after that motion was filed with

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the United States Court of Appeals for the Federal Circuit. I, therefore, immediately retained the firm of Finnegan, Henderson et al. to oppose the joint motion to vacate on Izumi's behalf.

I declare under penalty of perjury that all of the foregoing is true and correct pursuant to 28 U.S.C. §1746.

May 28, 1992
Date

/s/William L. Androlia
William L. Androlia

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WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601-9703
(312) 558-5800

William L. Androlia
Koda & Androlia
1880 Century Park East
Suite 519
Los Angeles, California 90067

Facsimile (312) 558-5700

March 30, 1992

Re: *Windmere/Izumi/Philips*

Dear Mr. Androlia:

The Windmere/Philips case has now been briefed and we are awaiting the next event, which will be oral argument. I do not know when that will occur. In the meantime, negotiations with Sullivan & Cromwell have proceeded and we have agreed on a specific number on which to base a settlement of that case.

There are other negotiations of that settlement involving what to do with the outstanding judgment, etc. that will also proceed. I have advised David Friedson and Windmere and Sullivan & Cromwell that I cannot negotiate those terms involving a settlement because there is a possibility that such negotiations might put me in conflict with Izumi's interest.

This letter simply brings you up to date to the extent that I can disclose the matter to you and advise you that further negotiations regarding settlement involving matters other than the amount will be negotiated by other attorneys who will proceed at the direction of David Friedson. I will not participate in those negotiations.

ELF:pn
cc: David M. Friedson

Very truly yours,
/s/ Edward L. Foote
Edward L. Foote

FACSIMILE

KODA AND ANDROLIA

PHONE: (213) 277-1391 FAX: (213) 277-4118

TO: Mr. David Friedson, President, Windmere

FROM: William L. Androlia of Koda and Androlia

DATE: April 1, 1992

SUBJECT: Philips/Windmere Settlement

Dear David:

We received this date a letter from Mr. Foote indicating that you are again in settlement discussions with Philips over the Miami case. In Mr. Foote's letter he states "... we have agreed on a specific number on which to base a settlement of that case" and "There are other negotiations of that settlement involving what to do with the outstanding judgment".

From Mr. Foote's statements we assume that Philips and Windmere have agreed upon a sum of money for which both parties would end the Miami litigation and the appeal and that Philips and Windmere are now discussing what to do with the Judgment, if anything.

We trust that in your decision as to what to do with the Judgment, you will not agree to anything which would harm Izumi and/or its business in the United States or which might be a breach of the indemnity between Windmere and Izumi.

We are sorry were not able to talk to you first on this matter before sending this Fax, but Ed's letter did not arrive until the afternoon mail and Windmere was already closed. We will try to call you on April 2, 1992.

Sincerely

/s/ William L. Androlia
William L. Androlia

cc: Mr. Shunji Izumi

**APPENDIX R – ORDER OF THE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA,
ENTERED DECEMBER 31, 1992**

[Caption Omitted in Printing]

ORDER

THIS COURT, having entered final judgments in this matter dated (1) April 30, 1986 (on U.S. Philips Corporation's claim of patent infringement), (2) April 6, 1990 (on Windmere Corporation's counterclaims under §2 of the Sherman Act), and (3) May 4, 1990 (on North American Philips Corporation's Lanham Act claim) (the latter two which are collectively referred to herein as the "1990 Judgments"); and the 1990 Judgments having been appealed to the United States Court of Appeals for the Federal Circuit; and the Federal Circuit having vacated the 1990 Judgments, and this Court, having received the mandate of the Federal Circuit, issued on October 7, 1992, instructing that the above-captioned action be dismissed with prejudice; this Court hereby enters an order dismissing with prejudice and without costs all those claims subject to the 1990 Judgments, including all verdicts and orders regarding such claims.

DONE AND ORDERED in Chambers at Miami, Florida this 31 day of December, 1992.

/s/ Stanley Marcus
Stanley Marcus
District Court
Southern District of Florida

APPENDIX S - PLAINTIFF'S TRIAL EXHIBIT 548
FILED IN THE SOUTHERN DISTRICT OF FLORIDA

PLAINTIFF'S
EXHIBIT
548

1984

1986

1988

1320

650TX

650TX

\$28.50

\$30.30

\$32.24

Norelco
Price

Retail 36.67

\$38.20

\$42.50

Norelco 27.42

27.64

27.25

Price
adjusted
for inflation